

114

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913

No. ~~1100~~546

MAYOR AND ALDERMEN OF THE CITY OF VICKSBURG,
APPELLANTS,

vs.

W. A. HENSON, RECEIVER OF THE VICKSBURG WATER
WORKS COMPANY AND LELIA BOYKIN.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE FIFTH CIRCUIT.

FILED MAY 8, 1913.

(23,678)

(23,678)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 1103.

MAYOR AND ALDERMEN OF THE CITY OF VICKSBURG,
APPELLANTS,

75.

W. A. HENSON, RECEIVER OF THE VICKSBURG WATER
WORKS COMPANY AND LELIA BOYKIN.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE FIFTH CIRCUIT.

INDEX.

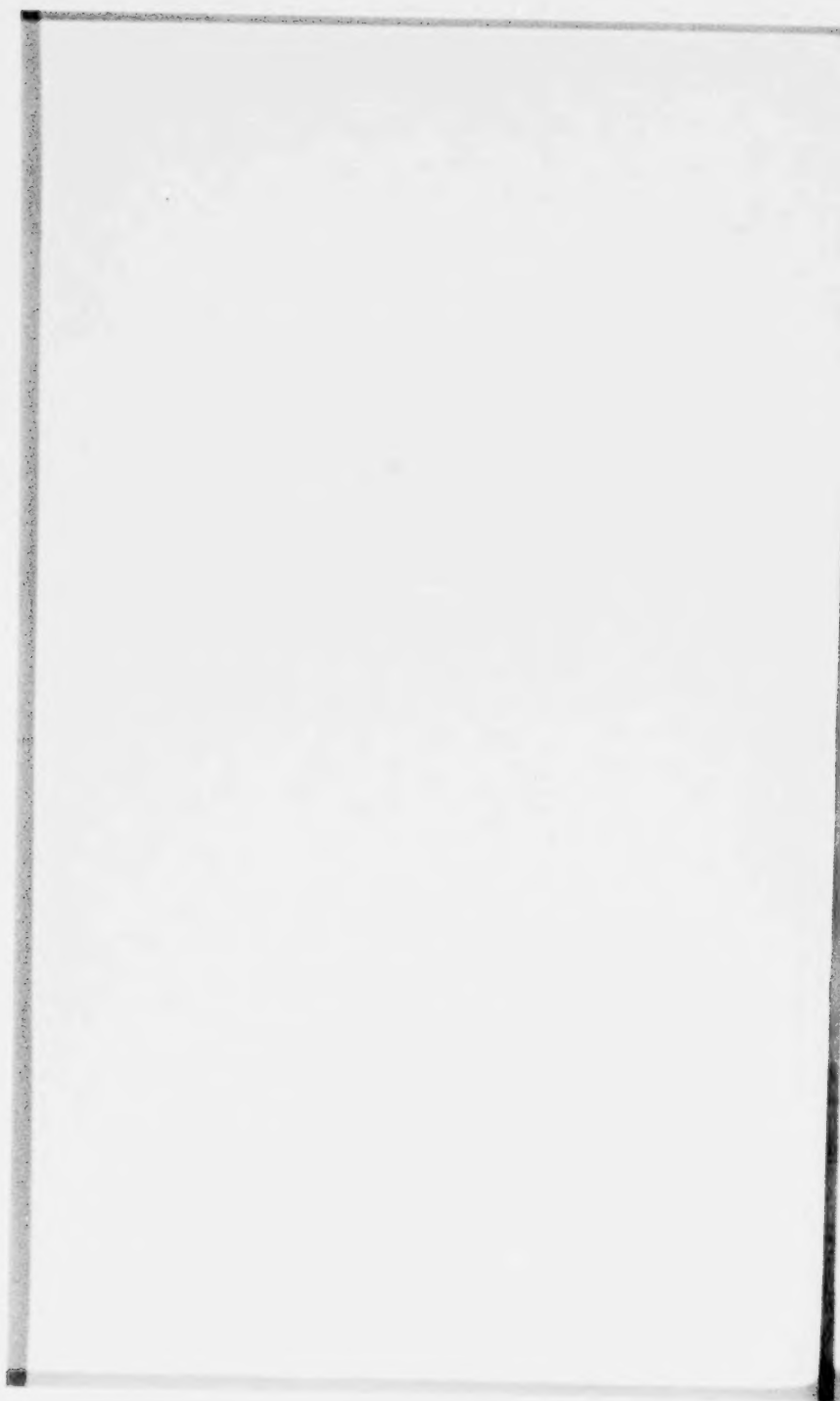
Caption.....	Page
Transcript from the district court of the United States for the southern district of Mississippi.....	0
Caption.....	1
Bill of complaint.....	1
Answer.....	2
Exhibit "A"—Pleadings and final decree <i>In re</i> "Vicksburg Water Works Company <i>vs.</i> Mayor and Aldermen of the City of Vicksburg, No. 41, in equity, U. S. circuit court, southern district of Mississippi".....	9
Amended and supplemental bill.....	24
Answer to original and supplemental bill.....	24
Final decree.....	27
Amended and supplemental bill of complaint.....	46
Answer to amended and supplemental bill.....	49
Replication.....	75
Supplemental bill of complaint.....	80
Decree granting restraining order.....	81
	83

	Page
Restraining order and marshal's return.	85
Answer to supplemental bill.	86
Replication.	88
Petition of Lelia Boykin to be made a party complainant.	89
Answer of complainant to petition of Lelia Boykin.	91
Answer of defendant to petition of Lelia Boykin.	91
Decree admitting Lelia Boykin as a party complainant.	93
Exhibits offered on behalf of complainant.	93
Amendment to charter of city of Vicksburg, May 1, 1905.	93
Amendment to charter of city of Vicksburg, November 6, 1911.	95
Copy of resolutions of December 17, 1912, to lay water mains, etc.	97
Exhibit "A"—Bullock franchise, water works ordinance.	98
"B"—Original bill of complaint, cause No. 41, in equity.	106
"C"—Amended and supplemental bill, cause No. 41, in equity.	121
"D"—Answer, cause No. 41, in equity.	121
"E"—Final decree, cause No. 41, in equity.	121
"F"—Assignment of errors in the Supreme Court of the United States on appeal in cause No. 41, in equity.	122
"H"—Estimate of value of water works by Jno. W. Alvord.	126
"I"—Senate bill No. 460, An act to validate all municipal bonds, etc.	131
Mandate of the Supreme Court of the United States <i>In re</i> Mayor and Aldermen of City of Vicksburg <i>vs.</i> Vicksburg Water Works Company, No. 19551, on appeal in cause No. 41, in equity.	132
Opinion of the Supreme Court of the United States on appeal in cause No. 41, in equity.	136
Note of evidence.	149
Order taking cause under advisement.	152
Abstract of evidence on behalf of complainant.	153
Deposition of A. M. Paxton.	153
L. P. Cashman.	172
E. A. Fitzgerald.	174
Chas. E. Wright.	174
John G. Cashman.	175
Agreement as to testimony of John W. Alvord.	176
Exhibit "B"—Tabulated statement of water depreciation and value, etc.	180
Agreement as to depositions of Abe Kiersky and A. M. Paxton.	182
Deposition of M. O. Crumpler.	182
Comparison of three valuations of water-works property.	190
Motion to suppress depositions of complainant.	201
Abstract of evidence for defendant.	202
Testimony of A. M. Paxton.	202
J. D. Laughlin.	204
J. H. Short.	204
Final decree.	205
Opinion of the court.	206
Petition for appeal and order.	211
Assignment of errors.	212
Appeal bond.	213

INDEX.

iii

	Page
Copy of citation and acknowledgment of service	215
Stipulation as to date of petition for appeal and assignment of errors ...	216
Order as to transcript of record	217
Clerk's certificate	218
Motion for certiorari to perfect record.....	220
Exhibit annexed to deposition of M. O. Crumpler, referred to at page	
192 of transcript.....	220
Cut showing tunnel outlay.....	221
Cut showing proposed arrangement of vertical turbine-driven pumps.	222
Clerk's certificate	223
Motion of appellees to dismiss	224
Notice to appellant and acknowledgment of service.....	225
Order: Motion to dismiss continued, etc.	226
Argument and submission.....	226
Opinion of the court.....	227
Judgment	227
Petition for rehearing	228
Order denying rehearing	229
Petition for appeal and order ...	230
Assignment of errors	231
Appeal bond.....	233
Clerk's certificate	235
Citation and service.....	236



UNITED STATES OF AMERICA.

United States Circuit Court of Appeals, Fifth Judicial Circuit.

PLEAS AND PROCEEDINGS had and done at a regular term of the United States Circuit Court of Appeals for the Fifth Circuit, begun on Thursday, November twenty-first, A. D. 1912, at New Orleans, Louisiana, before the Honorable Don A. Pardee and the Honorable David D. Shelby, Circuit Judges, and the Honorable William B. Sheppard, District Judge.

MAYOR AND ALDERMEN OF THE CITY OF
VICKSBURG,

versus

Appellants,

W. A. HENSON, RECEIVER OF THE VICKSBURG
WATER WORKS COMPANY, ET AL.

Appellees.

BE IT REMEMBERED, that heretofore, to-wit, on the 24th day of February, A. D. 1913, a transcript of the record of the above styled cause, pursuant to an appeal from the District Court of the United States for the Southern District of Mississippi, was filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as No. 2480; and that on the 10th day of March, A. D. 1913, a supplemental transcript of the record in said cause was filed, which said transcript and supplemental transcript are as follows:

UNITED STATES OF AMERICA.

IN THE DISTRICT COURT OF THE UNITED STATES,
WESTERN DIVISION OF THE SOUTHERN DIS-
TRICT OF MISSISSIPPI.

MAYOR AND ALDERMEN OF THE CITY OF VICKS-
BURG, DEFENDANT,

Appellant,

versus

No. 119 Equity

THE VICKSBURG WATER WORKS COMPANY, AND
LIELA BOYKIN, COMPLAINANTS,

Appellees.

On Appeal to the Circuit Court of Appeals for the Fifth
Circuit.

TRANSCRIPT OF RECORD.

BE IT REMEMBERED, That at a regular term of the District Court of the United States, in and for the Western Division of the Southern District of Mississippi, and the Fifth Circuit thereof, begun and holden at Vicksburg, Mississippi, on the 6th day of January, A. D. 1913, and which term adjourned on the 11th day of January, A. D. 1913, the Honorable H. C. Niles, United States District Judge for the State of Mississippi, presiding, the following cause came on for trial and was tried, to-wit: The Vicksburg Water Works Company, Complainant, vs. The Mayor & Aldermen of the City of Vicksburg, Defendant. No. 119 Equity.

ORIGINAL BILL.

In the District Court of the United States in and for the Western Division of the Southern District of Mississippi.

W. A. HENSON, RECEIVER,

vs.

MAYOR AND ALDERMEN OF THE CITY OF VICKSBURG.

To the Honorable H. C. Niles, Judge:

W. A. Henson, receiver of the Vicksburg Water Works Company, complainant, a citizen and resident of Chattanooga, Tennessee, presents the following bill of complaint against the Mayor and Aldermen of the City of Vicksburg, a municipal corporation under the laws of the State of Mississippi, defendant, and shows:

That complainant was duly and legally appointed receiver of the property, business and affairs of the said Vicksburg Water Works Company by decree of this Honorable Court made on the 28th day of December, 1910, in a certain suit therein pending under the name and style of the Citizens Bank & Trust Company vs. Vicksburg Water Works Company, No. 111 Equity, on the docket of said court, and imme-

diately qualified as such and went into possession of all of the property of the Vicksburg Water Works Company and has since remained, and is now in the sole and exclusive possession thereof, and is now and has, since his appointment as receiver, had complete and absolute charge of all of the business and affairs of said company:

That all of the property owned by the Vicksburg Water Works Company is situated in the said City of Vicksburg, Mississippi, and is assessed for taxation in said city and complainant paid taxes thereon for the year of 1911, and should his appointment continue will pay taxes thereon for the year of 1912, and for such succeeding years as he may continue to perform and discharge the duties as such receiver.

That by reason of the facts stated, complainant is advised that he is a taxpayer of said city, and as such is entitled to all the rights, privileges and benefits accruing and appertaining to such.

That among other properties owned by the said Vicksburg Water Works Company is a certain franchise contract granted by the Mayor and Aldermen of the City of Vicksburg to Samuel R. Bullock & Co., on the 18th day of November 1886, which said franchise was approved by the Mayor on the 19th day of November, 1886, and was afterwards accepted by the said Samuel R. Bullock & Company, and thereby became binding upon both parties as a contract. The said ordinance will be found on page — of Minute Book — of the records of the said defendant in the office of the Clerk of said city, and is hereby specially referred to and made a part hereof, the same as if fully copied and set out herein.

That the said franchise has passed by successive transfers and assignments from Samuel R. Bullock & Company to the Vicksburg Water Works Company, which is now the owner thereof, and entitled to all the rights, privileges and benefits granted by the said city under said franchise to the said Samuel R. Bullock & Co.

That the said franchise among other things, under Section 1 thereof, provides as follows:

"That in consideration of the public benefit to be derived therefrom the exclusive right and privilege is hereby granted for the period of thirty (30) years from the time that this ordinance takes effect, unto Samuel R. Bullock and Company.

their associates, successors and assigns; of erecting, maintaining and operating a system of water works in accordance with the terms and provisions of this ordinance, and of using the streets, alleys, public squares and all other public places within the corporate limits of the City of Vicksburg, Mississippi, as they now exist or may hereafter be extended and within such other territory as may now or hereafter be under its jurisdiction for the purpose of laying pipes, mains and other conduits and erecting hydrants and other apparatus for the conducting and furnishing an adequate supply of good wholesome water to the City of Vicksburg, Mississippi, and to its inhabitants for public and private use and for making repairs and extensions to the said system from time to time during the period in which this ordinance shall be in force."

That the said defendant city after entering into said contract, and after the purchase of same by complainant, to-wit, during the year of 1900, undertook to abandon the said contract and free itself of the obligations thereby imposed and to that end procured the passage of an act by the

4 Legislature of the State of Mississippi, authorizing and empowering it to build a water works of its own and to operate the same and by resolution of its Board of Mayor and Aldermen denied any and all obligations to the said Vicksburg Water Works Company, and thereupon filed a bill in the Circuit Court of the United States in and for this district praying for an injunction to restrain said city from impairing the obligations imposed by said contract, said suit being entitled Vicksburg Water Works Company vs. Mayor and Aldermen of the City of Vicksburg, and being numbered 41 on the equity docket of said court.

That upon a final hearing of said cause, among other things it was decreed of and concerning said franchise as follows:

"That the said ordinance contract and franchise be and is hereby declared and held to be in every respect legal, valid and enforceable and binding upon said defendant, and said defendant is hereby perpetually enjoined from infringing, ignoring, rescinding or denying liability under said ordinance, contract and franchise in any of its parts, or from in any manner disturbing or interfering with the rights, privileges and benefits acquired by complainant thereunder."

It was further decreed upon a final hearing of said cause of and concerning the said defendant city in reference to its obligations under the said franchise ordinance as follows:

"Fifth. That the said defendant refrain from constructing water works of its own until the expiration of the period prescribed in said ordinance, contract and franchise, dated the 16th day of November, 1886."

That the defendant city procured an appeal from the said decree above mentioned to the Supreme Court of the United States, upon which said appeal the said Supreme Court of the United States ratified and affirmed the said decree. Upon this point the Court said:

"We find no error in the decree of the Circuit Court enforcing the contract rights of the complainant and enjoining the city from erecting its own works during the term of this contract."

The opinion will be found in Vol. 202, pp. 453-473 of the official reports of said court.

That notwithstanding the said decree above set out, and the affirm— and [affirmance] thereof by the said Supreme

5 Court of the United States, the said defendant has nevertheless continuously sought some means of freeing itself from the obligations of the said contract and of owning and operating water works plant of its own, and to that end it has frequently made overtures for the purchase of the now existing plant of the Vicksburg Water Works Company, and the said company has made divers offers of sale or [of] its property and business to the said defendant, the last offer being in the sum of \$375,000.00, the property to be delivered Jan'y 1st, 1913.

Complainant is advised that the property of the Vicksburg Water Works Company, offered for sale to the defendant as aforesaid, is worth about \$600,000.00, but the said defendant has refused each and all of the offers made by the said Vicksburg Water Works Company and still so refuses, but nevertheless seeks to purchase said property at a price not exceeding \$300,000.00, which is grossly under the true value of said property.

Complainant further shows that upon the 1st day of January, 1912, the said defendant passed a resolution declaring its purpose and intention to construct a water works plant of its own, and to that end to issue \$400,000.00 in bonds to be executed and sold for the purpose of raising funds for the construction of such plant, the said plant, however, not to be operated until after the expiration of the said franchise above mentioned, and the said resolution further provided for the calling of an election to authorize the issuance of said bonds, the same to be held on the 14th day of February, 1912, upon which said date the said defendant held said election and afterwards, to-wit, on Feb. 15th, declared that the same had been carried and that the said city was thereby authorized and empowered to issue said bonds for said purpose; and again, on February 19th, the said defendant passed an ordinance declaring the said bond election to have been carried in favor of the issuance of the said bonds, and that the said defendant city had been thereby authorized and empowered to execute and sell the same.

Complainant further shows that if the said bonds should be issued and sold, that it, as a taxpayer, will be compelled and required to pay a part thereof, and to pay annually a part of the interest on said bonds by way of taxes upon its said property, and in addition thereto its said property will be greatly depreciated in value by the issuance and sale of said bonds, and also by the construction of another water works plant in the City of Vicksburg during the pendency of its said franchise.

Complainant is further advised that even should the city elect to construct a water works of its own and have the same ready for operation at the expiration of said franchise there is no necessity for commencing at so early a date.

That the time required for building a water works plant in and for said defendant city is not exceeding eighteen months, yet the said defendant city is seeking to float bonds for the construction of the same at a period more than fifty months before the said city would be authorized to operate said plant.

That complainant and other taxpayers, in the meantime will be required to pay taxes upon said bonds, and the plant, if constructed, will be lying idle and constantly diminishing in value.

Complainant further shows upon information and belief,

that the real purpose of said city in seeking to negotiate and sell the said bonds at the present time is not to construct a water works plant for said city, as stated in the order for said election and the proceedings of the City Council of defendant, but, on the contrary is for the purpose of depreciating the value of the plant now owned by the Vicksburg Water Works Company, so that the defendant city may be enabled thereby to purchase the said existing plant at a price materially under its true and actual value and thereby defraud the said Water Company, and its bondholders, of a large sum, to-wit, so much as the said defendant city may be enabled by the issuance of the said bonds at the present time to purchase the said property under its true and actual value.

Complainant is advised that under the circumstances the calling of the said election, at said time, for the purpose aforesaid, is a violation of the said injunction of this Honorable Court, as set out and provided in the final decree in said cause No. 41 equity, and the said defendant city and its mayor and aldermen, are each and all severally in contempt of this Honorable Court in calling and holding the said bond election and in seeking to issue the said bonds at the present time for the purpose aforesaid, and the complainant is entitled to have each and all of them cited as and for contempt of this Honorable Court, and to have the said bond election declared void and held for nought.

Complainant further shows that, even if the said defendant had the right to call said election and issue the said bonds, as sought by it, that nevertheless it was bound in proceeding to that end to comply with the charter and ordinances of said city and the laws of the State of Mississippi pertaining thereto.

That the charter of the City of Vicksburg by amendment passed on the 1st day of May, 1905, approved by the Mayor on the 2nd day of May, 1905, and by the Governor on the 3rd day of June following, provides among other things as follows:

"What is to be done before issuing bonds? Before providing for the issuance of any bonds, the Mayor and Aldermen shall publish notice of the proposal to issue the same in a newspaper published in the municipality for three weeks next preceding; and, if within that time, twenty per centum of the

adult taxpayers of the municipality shall petition against the issuance of the bonds, then the bonds shall not be issued, unless authorized by a majority of the electors voting in any election to be ordered for that purpose. All the expense of preparing the bonds publishing notices and holding such election shall be paid out of the municipal treasury.

8

Charter.

That under the foregoing provision it was essential for the Mayor and Aldermen of said defendant city before attempting to issue the said bonds, or to call the said bond election, to first give notice to the taxpayers of said city of the proposal to issue said bonds by publication in some newspaper published in said city for three consecutive weeks before ordering the said election, but nevertheless the said Mayor and Aldermen neglected and failed to make such publication.

That by reason of the said failure of the said Mayor and Aldermen complainant is advised that the said Board of Mayor and Aldermen were utterly without power or authority to hold said election, and that its attempt to do so was ultra vires, and that all the acts and doings of the said Mayor and Aldermen in that regard were and are utterly void, and that the said defendant city is now wholly without power or authority to issue the said bonds under and by virtue of said election or to take any further action looking to that end.

That the amount involved in this suit, exclusive of interest, costs in excess of \$3000.00.

The premises considered complainant is advised that he is entitled to have the said election declared void and of no effect, and to have the city immediately restrained from issuing said bonds or from taking any further action under said pretended election to that end, and upon final hearing to an injunction perpetually restraining the said city from proceeding to issue said bonds under said election.

Now, to the end that complainant may be relieved touching the matter and things above set out, complainant prays this Honorable Court for process against the said Mayor and Aldermen of the City of Vicksburg making it a party defendant hereto, but answer under oath is hereby especially waived, and for an immediate restraining order against the said city requiring it to desist from any further action looking to the

W. A. HENSON, Receiver, by
J. C. BRYAN, Sol.

The above and foregoing has the following indorsement thereon, to-wit: No. 119 Equity. W. A. Henson, Receiver, vs. The Mayor and Aldermen of the City of Vicksburg. Original Bill. Filed March 2nd, 1912. L. B. Moseley, Clerk.

10 ANSWER TO ORIGINAL BILL AND EX-
HIBITS TO ANSWER EXCEPT EX-
HIBIT A.

In the District Court of the United States for the Western
Division of the Southern District of Mississippi.

W. A. Henson, Receiver.

vs.

vs.
Mayor and Aldermen of the City of Vicksburg.

The Mayor and Aldermen of the City of Vicksburg, saving and reserving unto itself all manner of benefit or advantage which can or may be had or taken to the bill of complaint herein filed, by reason of the many imperfections, uncertainties, and inaccuracies therein contained, and answering only unto so much and such parts thereof as it is advised it is necessary or material for it to make answer unto, answering, says:

Defendant admits that W. A. H.

Defendant admits that W. A. Henson was appointed by this court as receiver of the Vicksburg Water Works Company and duly qualified as such, but denies that he has since remained and is now in the sole and exclusive possession of the prop-

necessary steps preliminary to the building of a water works plant of its own to be operated after the expiration of said franchise, is a matter wholly within its discretion and with which complainant has no concern. It shows the fact to be, however, that it will take much longer than eighteen months to construct such a system of water works, and that it was necessary to make a start several years before the expiration of said franchise, for the reason that it was fully advised of the contentions and litigious character of the Vicksburg Water Works Company, and did not doubt that it would undertake by vexatious and frivolous litigation to prevent it from performing its duty to its citizens to equip itself to furnish

13 water upon the expiration of said franchise. And defendant shows that this very suit confirms the wisdom of its policy in commencing operations a sufficient time before the expiration of said franchise to enable it to defeat in the courts all such frivolous and vexatious litigation as might be instituted by complainant or the Vicksburg Water Works Company.

Defendant denies that its real purpose in seeking to negotiate and sell the said bonds at the present time is not to construct a water works plant of its own, but is to depreciate the value of the plant now owned by the Vicksburg Water Works Company, so that defendant may be enabled to purchase it at a price materially under its true and actual value, and thereby defraud the said Water Works Company or its bondholders.

Defendant denies that under the circumstances the calling of said election was a violation of the injunction by this Honorable Court, as set out and provided in the final decree in said cause No. 41 Equity, and denies that its Mayor and Aldermen are each and all in contempt of this Honorable Court in calling and holding the said bond election and in seeking to issue the said bonds at the present time, and denies that complainant is entitled to have each and all of them cited as in and for contempt of this Honorable Court and to have the said bond election declared void and held for naught.

Defendant avers that at the time the bill of complaint was filed in said cause by the Vicksburg Water Works Company, it had denied all liability on account of the franchise owned by said company, and had announced its purpose to build a water works plant of its own, to be immediately operated in competition with that of the Vicksburg Water Work Com-

pany, and that the sole question presented by the pleadings in said cause was whether or not defendant had the right to compete in this manner with the Vicksburg Water Works Company. Defendant shows that the question of whether or not it had the right in anticipation of the expiration of the said franchise and during the last years of its duration, to construct a water works plant to be operated only upon the expiration of said franchise, was not and could not have been considered or determined in said cause, for the reason that at the time of its institution the said franchise had sixteen years to run and defendant had no idea or thought of erecting a plant to be operated after its termination. Defendant shows that this is apparent from the pleadings in said cause and from the opinion of the Supreme Court of the United States, and that the final decree in said cause must be construed with reference to and limited by the issues raised by said pleadings and the discussion thereof in the opinion of the Supreme Court of the United States.

Defendant files herewith as Exhibit "A," the pleadings and final decree in said cause, and prays that they may be taken as a part hereof.

Defendant shows that this principle has been recognized by the courts of last resort of the various States, by the inferior Federal Courts, and by the Supreme Court of the United States itself. That the latter Court, in the case of *Graham vs. Railroad Co.*, 3 Wall. 710, said:

"It is our duty to construe the decree with reference to the issue it was meant to decide. Its words are very broad and very emphatic; but we cannot say that they were intended by the District Court to have any greater effect than to avoid and set aside, as against Cleveland, the agreement and the judgment impeached by his bill. We think, on the contrary, that a decree having such an effect could not have been properly rendered upon the pleadings and issue in that cause."

The same Court, in the case of *Barnes vs. Chicago, etc., Railway*, 122 U. S. 14, said:

"Every decree in a suit in equity must be considered in connection with the pleadings, and, if its language is broader than is required, it will be limited by construction so that its effect

shall be such, and such only, as is needed for the purposes of the case that has been made and the issues that have been decided."

Defendant shows that not only is this rule of construction universally adopted, but that the various courts, including the Supreme Court of the United States have repeatedly

15 held that a decree which undertakes to adjudicate questions not properly presented by the pleadings, is to that extent a nullity. That this rule is founded upon common sense and upon actual necessity, for it would otherwise be possible for unscrupulous litigants to impose upon courts by deliberately framing decrees which, while on their face seemed proper, were in fact so cunningly framed as to cover matters not in the contemplation of the court, and that any other rule would result in the taking of property without due process of law, for the reason that questions might be determined against litigants which they had no opportunity to defend.

Defendant shows that so far as it is advised, no claim has ever been made by complainant until the filing of its bill in this cause, that the effect of its franchise was to prohibit the city from erecting a water works system of its own during the existence of said franchise. And defendant shows that this claim is not even propounded by said bill of complaint, inasmuch as the rights asserted therein are founded, not upon the franchise, but upon said final decree. Defendant shows that complainant could not in reason assert that the franchise had such effect, because its very language excludes any such construction.

Section 1 provides, that "in consideration of the public benefit to be derived therefrom, the exclusive right and privilege hereby granted for the period of thirty years from the time that this ordinance becomes effective, unto Samuel R. Bullock & Company, their associates, successors, and assigns, of erecting, maintaining and operating system of water works in accordance with the terms and provisions of this ordinance." It is thus manifest that no exclusive right was granted to erect water works during the period of the franchise, but only to "erect, maintain and operate"; and defendant shows that when the terms "erect" or "construct" are used in said decree and in the opinion of the Supreme Court

of the United States, they are intended to be used as synonymous with the phrase, "erect, maintain and operate."

Defendant shows that the question discussed by
16 by the Supreme Court in its opinion, is not whether it has the right during the period of said franchise to erect a water works system, but whether it has the power during that period of competing with the complainant; that this is evident from a reading of the entire opinion, and that the question to be decided is so described in a number of places in said opinion. By way of illustration defendant shows that almost at the outset of said opinion Mr. Justice Day used the following language:

"The suit was brought by the Water Works Company, claiming the exclusive right as against the city under a contract with it for the construction and maintenance for a period of thirty years of a system of water works, which exclusive contract it was alleged would be practically destroyed if subjected to the competition of a system of water works to be erected by the city itself, which was in contemplation under authority of an act of the Legislature of Mississippi, authorizing the Mayor and Aldermen of the City of Vicksburg to issue bonds to the amount of \$375,000.00 to purchase or construct a water works system and a sewer system, and for certain other purposes."

The purpose of the bill of complaint which initiated the litigation in cause No. 41, was thus clearly stated to have been to enjoin the city from "constructing and maintaining" a water works system in order that it might be prohibited from competing with complainant. Defendant shows that in another portion of said opinion the scope of the litigation was thus stated:

"The principal controversy in the case is as to the correctness of the decree of the court below restraining the city from erecting a water works of its own within the period named in the contract, which decree proceeded upon the theory that the city had excluded itself from erecting or maintaining a system of water works of its own during that period."

Defendant shows that it is manifest that the court used

the word "erecting" as synonymous with "erecting or maintaining," and that whenever these words are used they are intended to be construed with reference to the language of the franchise which has been quoted above.

Defendant shows that in said opinion the Supreme Court held that said franchise was to be "most strongly construed in favor of the public, and that where the privilege
17 claimed is doubtful nothing is to be taken by mere implication as against public rights. This rule has been applied to a series of contracts in water works and lighting cases, and we have no disposition to detract from its force and effect. And unless the city has excluded itself in plain and explicit terms from competition with the Water Works Company during the period of this contract, it cannot be held to have done so by mere implication."

The court then analyzed said franchise to see whether or not the city had excluded itself, not from constructing water works, but from competing with the existing system. In this connection it said:

"We cannot conceive how the right can be exclusive, and the city have the right, at the same time, to erect and maintain a system of water works, which may and probably would, practically destroy the value of rights and privileges conferred in its grant. If the right is to be exclusive, as the city has contracted that it shall be, it cannot, at the same time be shared with another; particularly so when such division of occupation is against the will of the one entitled to exercise the rights alone."

Again the Court said:

"On the authority of the Walla Walla case, the city had the power to exclude itself for the term of this contract, giving the words used only the weight to which they are entitled, without strain or unusual construction, and we think it was distinctly agreed that, for the term named, the right of furnishing water to the inhabitants of Vicksburg under the terms of the ordinance was vested solely in the grantee, so far, at least, as the city's right to compete is concerned."

Defendant shows that this is a succinct and comprehensive

statement of the scope and effect of said franchise, and it is an express adjudication that its purpose and effect was merely to exclude the city from "the right of furnishing water to the inhabitants of Vicksburg."

Defendant shows that many other quotations might be made from said opinion to show that the only question discussed was the city's right to compete with complainant, and that the entirely different question of its right to erect water works during the life of said franchise, to be operated after its expiration, is not even remotely alluded to.

Defendant shows that the construction sought to be placed upon the final decree in said cause No. 18 41 by complainant in this cause would have the effect of precluding it from building its own water works to be operated only after the expiration of said franchise, without its ever having been advised that such a question would be considered by the court, and without giving it any opportunity to be heard on the merits thereof.

Defendant shows that aside from all this and without regard to the true meaning and intent of said decree at the time it was rendered, this court, sitting as a court of equity, should not now give the effect claimed for it, for the reason that by reason of the early expiration of said franchise the relative equities of defendant and the Vicksburg Water Works Company and their relative rights and duties to each other and to the public have so changed as to make it inequitable to prohibit the defendant from taking the necessary steps to supply its citizens with water at the expiration of said franchise, in view of the announced purpose of the Vicksburg Water Works Company to refuse so to do at that time.

Defendant shows that the Vicksburg Water Works Company itself has always conceded that it had the right to build a water works plant of its own to be operated after the termination of said franchise, and that it is now estopped from asserting the contrary. Defendant shows that from time to time for several years past, as and when it caused certain of its streets to be paved, it caused water mains to be laid under said pavements, with the express design of having such water mains form part of the water works plant which it proposed to build, and that the laying of these mains constituted in part the construction of a water works system.

Defendant shows that in this work it has expended a very

large sum of money, to-wit, ——— dollars; that its plan in this particular and its expenditures in this behalf were fully

known to the Vicksburg Water Works Company, 19 and that it never asserted that the building of a water works plant by defendant, which was thus begun, violated the decree of this court in said cause No. 41, and never undertook to prevent the laying of the said mains.

Defendant shows that if it shall be prohibited from continuing the construction of a water works plant of its own, to be operated after the expiration of said franchise, the money heretofore expended by it in laying the said mains will be entirely lost to it, and that if the Vicksburg Water Works Company, or complainant, had intended to seek to prohibit defendant from constructing a water works system during the life of said franchise, it was their duty to take action before the laying of these mains. And defendant says that by failing to take such action they conceded its right to construct its own water works plant, and cannot now be heard to say that said right does not in fact exist.

Defendant shows that the Vicksburg Water Works Company and complainant, its receiver, actively participated in the recent election to determine the question of the issuance of said bonds. That it published many communications in the daily newspapers, and mailed many circular letters to the voters of Vicksburg, in which it discussed the proposed bond issue and sought to convince them that it was unwise and that defendant should purchase its plant. Defendant shows that on the day of said election the Vicksburg Water Works Company had workers employed, carriages engaged to carry voters to the polls, and otherwise participated in said election. Defendant shows that this election was held by it at great expense to itself, and that the Vicksburg Water Works Company, or its receiver, by participating therein and by conceding the city's right to build its own water works plant, estopped itself from now asserting the contrary.

Defendant shows that not only are the complainant and the Vicksburg Water Works Company estopped to claim that the final decree rendered in cause No. 41 Equity enjoins 20 and prohibits it from constructing a water works system of its own, to be operated after the expiration of said franchise, but that by conceding defendant's right so to do and acquiescing in its announced purpose to build

such water works, they have themselves construed said final decree as only enjoining defendant from building and operating water works in competition with the Vicksburg Water Works Company, and that, inasmuch as this construction is the same as that adopted by defendant, this court will itself accept and enforce the construction of said decree consented to and acquiesced in by all the parties to the litigation in which it was rendered.

Defendant shows that the whole purpose of complainant in instituting this suit is not to protect any rights which it fears may be violated, but to disable defendant from obtaining the money with which to build a water works plant and thus perform its duty to furnish water to its citizens at the expiration of said franchise, in order that the Vicksburg Water Works Company may then, by discontinuing the supply of water, force defendant to purchase its plant at an exorbitant price. Defendant shows that upon the expiration of said franchise the Vicksburg Water Works Company will be under no obligation to furnish water to it or to its citizens, and that, inasmuch as water is a vital necessity, it must itself prepare to supply water to itself and its citizens; that it will require at least two years to construct an adequate system of water works, and that if it cannot begin work until the expiration of said franchise its citizens will be without water for that space of time, and that the practical effect will be to compel defendant to purchase the existing plant for whatever price its owners may demand. Defendant shows that in circular letters sent to the qualified voters of Vicksburg the Water Works Company has announced that at the expiration of its

21 franchise it would refuse to furnish water, and has threatened that the city and its citizens would then be at its mercy. It shows that it would be a singular situation if the thirty years franchise granted by it and now owned by the Vicksburg Water Company should have the effect of releasing its holder from the duty to furnish water at its expiration and of prohibiting the city from itself assuming and performing this obligation at that time. In this connection defendant repeats that complainant does not claim that the issuance of bonds and the building of a water works plant to be operated after the expiration of said franchise is a violation thereof, but only complains that it is a violation of said final

decree which undertook to protect the rights growing out of and founded upon said franchise, and that by every principle of fair interpretation if complainant's rights growing out of said franchise are not violated the decree founded thereon is not infringed upon. In this connection defendant calls attention to the fact that the purpose of the bill of complaint and its prayers are not to prevent it from building a water works plant, but only from issuing bonds to secure funds so to do, and that, whatever may be said of said final decree, and in any view thereof, it cannot be claimed that it prohibits the issuance of bonds for any purpose, but only the actual construction of a water works system.

Defendant shows that inasmuch as complainant relies upon the technical language of said decree without regard to its true intent and purpose, he should only ask that defendant be prohibited from doing something in conflict with its strict terms.

Defendant again denies that its purpose in issuing bonds and erecting its own water works plant is to force the Vicksburg Water Works Company to sell its property for less than it is worth, and denies that its purposes in so doing is to injure said company in any way. It shows that for several years it negotiated with said company in an effort to reach an agreement

as to the purchase of its property, but having failed
 22 in this, it announced by a resolution of its Aldermen that it would make no further efforts in this direction, and that since the passage of said resolution it has entirely abandoned negotiations looking to the purchase of said property; that it has announced its policy to be to purchase the property of the Vicksburg Water Works Company if it shall be offered to it at what it regards as a fair valuation before it lets a contract for the construction of water works of its own; that so far as it is concerned, the question of the purchase of the property of the Vicksburg Water Works Company is not now and has not been for many months past, a subject for consideration, and that it is entirely due to the efforts of the Vicksburg Water Works Company to force it to purchase its said property that the question has been agitated in the public press and has been thrust upon this court in various ways.

Defendant shows that said Water Works Company has for

several years past been engaged in an active campaign to force it to purchase its property at an exorbitant price, and in pursuance thereof it has raised the rates charged by it for water to the utmost limit allowed by its franchise, and that said rates are in many respects actually prohibitive.

Defendant shows that said company and complainant, in pursuance of their policy of coercion and intimidation, have made exorbitant claims and demands on their customers for large sums of money falsely and fraudulently claimed to be due, and that in every way they have sought to make the situation so oppressive as to force defendant to purchase the said property.

Defendant avers that it has submitted to these exactions as patiently as might be, and that it is now simply seeking to do what it has an unquestioned legal right to do, and build its own water works plant for the purpose of fulfilling its duty to its citizens.

Defendant avers that if the effect of so doing shall be to injure the Vicksburg Water Works Company or depreciate its property, that is something for which it is not
23 responsible, and is a mere incident to the approaching termination of its franchise.

Defendant avers that the terms of said franchise are such as to enable the said Water Works Company to derive an enormous revenue entirely out of proportion to the service rendered by it or to the capital invested in its plant. That according to what purports to be a statement taken from its books, it derived net revenue of nearly \$69,000.00 during the year 1910, since which time it has enormously increased its rates; that if this statement is correct, the said company will before the expiration of its franchise, receive in net profits an aggregate sum greatly in excess of the entire amount it has invested in its plant, to say nothing of the tremendous profits heretofore earned by it.

Defendant avers that under these circumstances it ill befits said company to pursue the dog-in-the-manger policy outlined in the bill of complaint filed herein, by which it seeks to prevent defendant from furnishing its citizens with water at the expiration of said franchise, although it is under no obligation either to renew the same or to purchase the property of said company.

Defendant denies that it was under any obligation to give notice of its intention to issue bonds as set out in the bill of complaint, but shows that, even if this were so, the bonds, when issued, will nevertheless be legal, valid and binding obligations for the reason that the Legislature of the State of Mississippi, by act approved March 4, 1912, expressly provided that all bonds which had heretofore been authorized by a two-thirds majority of the qualified electors of a municipality voting at an election held for that purpose, under the provisions of Chapter 142 of the Acts of the Legislature of 1910, and of Sections 3419 of the Code of 1906, or under the provisions of any municipal charter substantially in

24 terms with the above statutes, but which have not been actually issued, notwithstanding the municipal authorities may have failed to publish notice of their proposal to issue said bonds as required by said statutes, or may have failed to take any of the preliminary legal steps towards the issuance of said bonds prescribed thereby, should be in all things made valid and binding by said act, and further provided that when so issued said bonds should be a binding obligation on the municipality issuing the same.

Defendant shows that the election hereinbefore referred to was held under said statutes and under the provisions of its charter substantially in terms therewith, and that said bonds were authorized by a majority greatly in excess of two-thirds of its qualified electors voting at said election, and that the effect of said act was and is to make the bonds proposed to be issued by it as aforesaid legal and valid without regard to whether or not any notice or other preliminary steps or proceedings which were required to be given or taken were omitted.

Defendant denies that complainant is entitled to have the said election declared void and of no effect and to have it restrained from issuing said bonds or from taking any further action under said election, and denies that complainant is entitled upon final hearing to an injunction perpetually restraining it from proceeding to issue said bonds under said election. And defendant denies that complainant is entitled to any relief whatsoever, as prayed for in said bill of complaint.


And now having fully answered, defendant prays that it

may be permitted to go hence without day, together with its reasonable costs in this behalf expended.

THE MAYOR AND ALDERMEN OF THE
CITY OF VICKSBURG.

By J. J. HAYES, Mayor.

25 ANDERSON & VOLLER,
 JOHN BRUNINI,
 O. W. CATCHINGS,
 Sol. for Dfdt.

26 State of Mississippi,
 Warren County, 
 City of Vicksburg.

This day personally appeared before the undersigned Clerk U. S. Court in and for the Southern District of Miss., the above named J. J. Hayes, Mayor of the City of Vicksburg, who on oath said that the matters and things stated in the foregoing answer as of his own knowledge are true as stated, and those stated on information and belief, he verily believes to be true.

J. J. HAYES.

Subscribed and sworn to before me, this the 1st day of April, 1912.

L. B. MOSELEY, Clerk. [Seal]
J. H. SHORT, D. C.

The above and foregoing has the following indorsement thereon, to-wit: 119 Equity. Vicksburg Water Works Company vs. Mayor and Aldermen of the City of Vicksburg. Answer. Filed and entered April 1st, 1913. L. B. Moseley, Clerk. J. H. Short, D. C.

27 AMENDED AND SUPPLEMENTAL BILL.

Vicksburg Water Works Company,

vs.

Mayor and Aldermen of the City of Vicksburg.

To the Honorable H. C. Niles, Judge of the United States Circuit Court in and for the Western Division of the Southern District of Mississippi, thereof, sitting at Vicksburg:

Your orator by way of amendment and supplemental to its original bill heretofore filed against the defendant, would respectfully state that since the filing of the said original bill, to-wit, on the 16th day of February, 1901:

1st. Your orator would respectfully state that since the passage and approval of the act of the Legislature entitled, "An act authorizing the Mayor and Aldermen of the City of Vicksburg to issue bonds to the amount of three hundred and seventy-five thousand (\$375,000) dollars, to purchase or construct, equip and maintain a water works system, construct and establish sewerage system to purchase grounds for, erect and equip a city hall, construct the necessary building for the hospital medical college, and for other purposes." Said act is to be found on page 180 et seq., of the sheet acts of the said State, and in accordance with its terms and provisions a pretended election was held on the 3rd day of July, 1900, under the authority _____ of a pretended resolution passed by the defendant on the question of bonding the city for said amounts and purposes was pretended to be submitted to the registered and qualified of _____ said city under its act, which propositions were carried by a small majority of the voters, which question was in words and figures as follows, to-wit:

"Be it resolved by virtue of the authority vested in the Mayor and Aldermen of the City of Vicksburg, by the act of the Legislature of Mississippi, entitled an act to authorize the Mayor and Aldermen of the City of Vicksburg to issue bonds to the amount of three hundred and seventy-five thousand (\$375,000) dollars, to purchase or construct, equip and maintain a water works system, construct and establish a

28 sewerage system, to purchase ground for, erect and equip a city hall, construct the necessary building for the hospital medical college and for other purposes. Approved March 9th, 1900.

An election shall be held on the third (3) day of July, on which day the question shall be submitted to the registered and qualified voters of said city whether the bonds of said city to the amount of three hundred and fifty thousand (\$350,000) dollars, to purchase or construct, equip and maintain a water works system, construct and establish a sewerage system, to purchase grounds for, erect and equip a city hall; shall be sold and issued for the above named purposes.

Be it further resolved that twenty (20) days notice shall be given in the manner provided for in said act, of the date, the amount of the bonds to be issued, and the purposes for which the same are issued. The ayes and naves being called on the motion that the said resolution be adopted, prevailed affirmatively, with the following votes: Ayes, Homberger, Caughlin, Montgomery and Walsh. Nays, Fousee, Campbell and Hayes." Said proposition will be found contained in Minute Book II, page 444 of the record of the minutes of the defendant.

2nd. Your orator respectfully shows that the proposition submitted to the qualified electors to be voted on to bond the city contains more than one object, in fact several distinct and entirely independent propositions, which were pretended to be submitted, as a whole to the qualified voters of said city, when they should have been submitted separately unaided by any other proposition, and should have been so acted upon by the Board of Mayor and Aldermen in their authority to authorize the submission of the same to the voters, and said acts of the Mayor and Aldermen should have been an ordinance and is therefore void and of no effect.

For these reasons, including those already mentioned in the original bill in this cause, the said bonds authorized to be issued and sold and said act and resolutions of said Board of Mayor and Aldermen, and said election are illegal
29 void, unauthorized and unconstitutional.

3rd. Your orator would further show, as before stated in the original bill of complaint in this cause, the defendant caused its charter to be amended by the Legislature of the

State of Mississippi in 1886, to provide for the erection and maintenance of a water works system to supply the said city with water or to contract with party or parties who should build and operate water works and the city having elected to enter into a contract with S. R. Bullock & Company and assigns on the —— day of November, 1886, to provide the defendant, the city, and the inhabitants thereof with water for public and domestic purposes for thirty (30) years at a stipulated price as agreed upon in said ordinance.

Therefore said city by its contract and ordinance with S. R. Bullock & Company and assigns are precluded from issuing and selling bonds to build, construct, maintain and operate a water works of its own, as provided by said legislative act and said resolution and said election of 1900, in competition with your orator against its own contract.

The premises considered, your orator prays that this Honorable Court will enjoin the defendant from issuing and selling said bonds for the purpose of building and constructing water works of its own in competition with your orator, and in addition thereto that this Honorable Court will decree said act, resolution and election to be invalid and unconstitutional, and that the defendant be precluded and restrained and enjoined from constructing water works of its own in said city, until the expiration of your orator's contract. And that the defendant be required to answer this amended bill without making any oath thereto and that your orator be entitled to and have the benefit of all general and special relief as may be just and right.

And as in duty bound your orator will ever pray.

(Signed) M. O. CRUMPLER.

30 Personally appeared before me L. B. Moseley of the United States Court in and for the Western Division of the Southern District of the State of Mississippi, one M. O. Crumpler, superintendent and general manager of the Vicksburg Water Works Company, and who as an authorized agent of said company makes oath that the foregoing matters and facts stated in the said foregoing amended bill of complaint of its own knowledge are true and correct and those stated on the information and belief, it believes to be true and correct.

Witness my hand and seal of office this 23rd day of April,
A. D. 1901.

[Seal]

L. B. MOSELEY, Clerk,
C. D. BANKS, D. C.

S. S. HUDSON and
A. A. EDWARDS,
Atty's for Complainant.

DEFENDANT'S ANSWER.

In the Circuit Court of the United States for the Western
Division of the Southern District of Mississippi.

Vicksburg Water Works Company

vs.

The Mayor and Aldermen of the City of Vicksburg.

The answer of the Mayor and Aldermen of the City of Vicksburg to the original and supplemental bill of complaint exhibited against them in this Court by the complainant named therein.

For answer to so much and such parts of said bill as they are advised it is material or necessary for them to answer, these respondents say:

They admit that the Board of Mayor and Aldermen on November 7th, 1900, adopted a resolution which is in words and figures as follows:

That the Mayor be and he is hereby instructed to notify the Vicksburg Water Works Company that the Mayor and Aldermen deny any liability upon any contract for the use of the water works hydrants; that from and after
31 August, 1900, they will pass a reasonable compensation for the use of said hydrants.

That the City Attorney shall take such action as shall be necessary to determine the rights of the city in the premises. But respondents say that this action on the part of the Board of said Mayor and Aldermen "did not assume to abrogate or take away" any of the rights of the said complainant existing by virtue of the alleged contract, and it is manifest that no

such intention or effect can be imputed to such resolution. That the said resolution does not seek to destroy or impair any contract, but merely denies legal liability thereunder; that the act of the Legislature of the State of Mississippi, approved on the — day of —, does not impair the obligation of the contract made with Samuel R. Bullock & Co., as averred in said bill.

That the averments in said bill in this regard do not constitute any ground for relief cognizable within the jurisdiction of this Court; that complainant has not averred and set forth in its bill any act having the effect to impair the obligation of said contract, and this court is therefore without jurisdiction to hear and determine the matters in said bill contained

(The matter inclosed between rules cancelled across the face with pencil.)

and they crave that they may have the same benefit of objection to said bill on said grounds as if formally demurred to and pray judgment of the same accordingly.

Respondents say that all of the questions involved in this controversy between said complainant and said defendant were taken cognizance of by the Chancery Court of Warren County, Mississippi, wherein a suit was instituted by the defendant against the complainant on the — day of — and is now there pending.

That it appears from the complainant's bill herein filed that the only matter of controversy between the complainant and the defendants, is as to whether the contract
 32 made with Samuel R. Bullock & Co., and his assigns, as aforesaid, has been transferred to the said complainant and whether the same is now in force against this defendant.

That no act is alleged by the complainant as having been done by the State of Mississippi or these defendants which in any way affects the question of said liability or was contemplated to have such effect upon said contract. That a copy of the bill of complaint is in said suit instituted in the Chancery Court aforesaid, is herewith filed as Exhibit "I."

That the said Chancery Court has jurisdiction of the questions raised by this complainant's bill and that this Honorable Court is without jurisdiction to hear and determine the same; all of which things the defendant avers to be true and pleads

the same to the jurisdiction of this court and prays accordingly, and as if formally pleaded.

These respondents admit that there is a provision in the contract made between the city and Samuel R. Bullock & Co., whereby the exclusive right is given to Samuel R. Bullock & Co., their successors and assigns for the period of thirty (30) years to maintain a system of water works and to supply said city and its inhabitants with water.

That said provision is in words as follows: "That in consideration of the public benefit to be derived therefrom, the exclusive right and privilege is hereby granted for the period of thirty (30) years from the time that this ordinance takes effect, into Samuel R. Bullock & Co., their associates, successors and assigns of erecting, maintaining and operating a system of water works in accordance with the terms and provisions of this ordinance, and of using the streets, alleys, public squares and all other public places within the corporate limits of the City of Vicksburg, Mississippi, as they now exist or may hereafter be extended and within such other territory as may now or hereafter be under its jurisdiction, for the purpose of laying pipes, mains and other conduits and erecting hydrants and other apparatus for conducting and furnishing an adequate supply of good wholesome water to the City of Vicksburg, Mississippi, and to its inhabitants for public and private use and for making repairs and extensions to said system from time to time during the period in which this ordinance shall be in force."

These respondents nevertheless say that no power was ever conferred either directly or indirectly upon said Mayor and Aldermen whereby they were authorized to grant by contract to any person or persons, the exclusive privilege for any period of time to furnish and supply said city and its inhabitants with water. That said provision in said contract is unauthorized, illegal and void, and respondents submit that so much and such parts of said bill, as is set forth in said provision in said contract, are insufficient to constitute any ground of relief, and they pray judgment thereof, and crave the same benefit of this objection as if formally demurred to.

Respondents further answering, say that on the —— day of March, 1887, the Vicksburg Water Supply Co., did not, as

averred in said bill, make, execute and deliver a deed of trust, "conveying all its franchises, ordinances and contract together with all other property of whatsoever kind or nature." (That the said complainant was particular in appending as exhibits copies of all writings referred to but did not append a copy of the said deed of trust.)

That the said deed of trust executed by the said Water Supply Company, as aforesaid, conveyed the property described therein as follows: "All of its real and personal property, goods and chattels now owned or which may be hereafter acquired by it, including its lands, water works, buildings, pump, houses, stand pipes, reservoirs, machinery pipes, mains, hydrants, apparatus and equipment situated in the City of Vicksburg, Mississippi, County of Warren, together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining and the reversion and reversions, remainder and remainders,

34 tolls, rents, issues, income and profit accruing therefrom; also all and singular, the company franchises, privileges, rights, liabilities which the Water Company now has and can exercise or shall hereafter acquire and possess. And also all the estate, right, title, interest, property, possession, claim and demand whatsoever as well in equity as in law of the Water Company of, in and to the property above described or hereafter acquired, and each and every part or parcel thereof with appurtenances."

That thereafter, as averred in said bill, deed of trust was foreclosed and the property therein described was sold to the complainant, and the defendant now pleads that the contract made with Samuel R. Bullock & Co., as averred in said bill, was not embraced in said descriptions and no interest in or to the same was by said sale conveyed to complainant, and the said complainant did not thereby acquire any right against the defendants.

That the so-called quit claim deed which was executed on the 18th day of October, 1900, and which was signed by Whitney Conant, president of the Vicksburg Water Supply Company, as averred in said bill, and is appended as Exhibit "G," falsely states the description of the property, which is contained in said deed of trust.

That the said Conant, president, and W. E. Snow, secretary,

had no authority from said Vicksburg Water Supply Company to make any such quit claim.

That upon its face it appears "that all of the corporate franchises, privileges and rights which the Vicksburg Water Supply Company had or could exercise," had been before the date of said quit claim deed sold at foreclosure under said deed of trust, and that the Vicksburg Water Supply Company was at the time a defunct organization without the right to exercise any corporate functions whatever, all of which matters and things the said defendant avers to be true and is ready to verify, and pleads the same to so much and such parts of said bill, and prays judgment whether he ought to be compelled to make further answer to said part and pleads the same benefits hereof as if formally pleaded.

35 Respondents further say that it — not true as averred in said bill that the said Samuel R. Bullock & Company were empowered by said contract and ordinance between them and the said defendants to organize and create a water works company and to sell and assign said contract and ordinance to any water company who would supply said city and its inhabitants in accordance with the terms and provisions of said contract and accept the terms and provisions thereof, and now says that by the 5th section of said contract, it is provided as follows:

"That the said Samuel R. Bullock & Company, their associates, successors and assigns, may procure the organization of a water works corporation under the laws of any State and may assign to it all the rights and privileges acquired thereunder, provided that the said assignments shall not invalidate or affect the bond required by Section seven hereof, and no assignment thereof shall be valid unless such assignee shall in writing to said Board of Mayor and Alderman accept this ordinance and become bound by its terms and obligations, and the said Mayor and Aldermen shall pass and enact such further and other ordinances, and do and perform such other acts, including the repassage of this ordinance in favor of the said corporation as may be necessary to invest in the said corporation the rights and privileges hereby granted."

That afterwards, to-wit, on the — day of —, in in pursuance of the authority conferred by this section, the said Samuel R. Bullock & Co., did cause to be organized a cor-

poration under the laws of the State of Mississippi, known and designated as the Vicksburg Water Supply Company, to which said corporation said contract was assigned by the said Samuel R. Bullock & Co., and became bound with the consent of the Mayor and Aldermen to the terms of said contract.

That by said section it was contemplated that no assignment of said contract should be made except by the said

Samuel R. Bullock & Company to a single corporation to be by them organized and the transfer to

be approved and accepted by the said city, so that the said Vicksburg Water Supply Company have no power or authority to assign said contract, either by said deed of trust or otherwise, to any one, and the said defendant has not approved or consented to any assignment by Vicksburg Water Supply Co. of said contract, all of which matters and things defendant avers to be true and pleads the same to such parts and so much of said bill and prays a judgment of this court whether it ought to be compelled to make further answer to said parts of said bill and craves benefit hereof as if formally pleaded.

These respondents further say: That by the 14th section of the contract averred in said bill to have been entered into between the complainant and these respondents by ordinance adopted on the 18th day of November, 1886, it is provided as follows:

Be it further ordained, That for the purpose of paying the obligations and liabilities of the said Mayor and Aldermen of the City of Vicksburg which shall accrue to the said Samuel R. Bullock & Company, their associates, successors and assigns by virtue of the terms and conditions of this ordinance, the said Mayor and Aldermen of the City of Vicksburg, or other duly constituted municipal authorities shall annually—and cause to be collected upon the taxable property of said city, a special tax to be known and designated as the water works tax, sufficient to meet and pay all of said obligations and liabilities during the continuance of this contract, and until all of said obligations shall be paid and discharged."

That there was no warrant or authority on the part of said Mayor and Aldermen to make any such provision or contract; that said stipulation is in contravention of the charter of said city and is illegal and void, so that said contract is wholly without effect, all of which matters and things re-

37 spondents aver to be true and plead the same to to said part of said bill and pray the judgment of this court whether it ought to make further answer thereto, and crave benefit hereof as if formally pleaded.

Respondents deny that on the 19th day of November, 1886, the said City of Vicksburg received any competitive bids for the erection of water works in said city, and they now show the fact to be that a corporation then known as the Vicksburg Water Works Company a short while before said date, made overtures to said city and proposed to enter into a contract for the building of water works, and that about that time the said Samuel R. Bullock & Company also proposed to enter into a contract with said city for said purpose; that a contest arose between these two parties in their endeavor to obtain such a contract from said city; that their propositions were in writing and open, and that it was at this stage of the discussion that it was proposed that the consideration of said question should be deferred to a special meeting, and all the parties were notified to present bids. That in point of fact, no other bids were offered, and the board proceeded to consider the propositions of the two parties already made and thereupon awarded said contract to Samuel R. Bullock & Company.

Respondents further answering, show that by the 25th section of the charter of said city it is provided that the Board of Mayor and Aldermen should not make any contract involving certain expenditures except upon advertisement for sealed proposals.

That by the letter and spirit of said provisions the power to make any contract for a supply of water could only be exercised by said Mayor and Aldermen after an advertisement for bids for same and in pursuance of the bids.

Yet respondents say that said Mayor and Aldermen did not advertise for bids for a contract to supply water, as required by said charter, and that the contract made with Samuel R. Bullock & Company was not made in pursuance of any such advertisement so that respondents say that said contract so made was unauthorized and is illegal and void, facts
38 respondents aver to be true and plead the same to said parts of said bill and pray judgment and crave the benefit thereof as if formally pleaded.

Respondents further answering, say that by the twelfth

section of said contract it is provided that the property and business of said water works plant should be exempt from taxation for the period of five years and thereafter shall not be assessed for more than fifty thousand dollars (\$50,000); and that said provision is unconstitutional and void and in consequence said contract is unauthorized and illegal.

Respondents admit the passage of the ordinance on the 19th day of November, 1886, a copy of which appears as Exhibit "B" in complainant's bill, but they deny that the same even when accepted by the said Samuel R. Bullock & Co., constituted a valid contract between said Bullock & Co. and respondents. They admit that said alleged contract was assigned by said Bullock & Company to the said Vicksburg Water Supply Co., which later company they deny now to be a going concern, but aver the same is defunct, without assets, property, franchises or organizations, and that it has been since the 8th day of August, 1900.

These respondents admit that on the 20th day of November, 1900, it received the notice marked Exhibit "H" to said bill, wherein it is asserted that the Vicksburg Water Works Company claimed to own as assignee the contract made with Samuel R. Bullock & Co., and gave notice that said company had agreed to be bound by the terms of said contract.

These respondents now show to the court, that long prior to said date it had been currently reported that said Water Works Company claimed not only to own said plant, but also was subrogated to the rights of Samuel R. Bullock & Co., under said contract; that in consequence thereof, the Mayor of the City of Vicksburg addressed several communications to the Water Works Company requesting to know by what authority and by what right it claimed to own said water works and assume—assert that the City of Vicksburg was

bound to it by the terms of said contract. That the resolution which is appended to said bill as Exhibit

39 "I" was introduced in said board on the — day of September, 1900, and was pending before said until the 13th day of November, 1900; that during all of said time complainant refused to make any reply to the said communication. It pretended that it was impossible to make answer thereto, it being declared to said board in open session —its constituted representative as the reason for such failure that one of the directors was in Paris and another in St.

Louis; although the muniments of its title such as it was were already in existence and well known to complainant at that time.

These respondents deny that the water which has been furnished by said Water Works Company since they acquired the ownership thereof, has been "good, wholesome water, fit for all purposes of domestic or manufacturing purposes." On the other hand they aver that said water has for the most part been charged with mud, sediment and other deleterious matter, injurious to the health of the people who use the same, and unfit for domestic use.

They deny the said Vicksburg Water Works Company has kept and maintained a pressure upon its mains to the extent stipulated and required in the contract with Samuel R. Bullock & Co. That for the failure of said company to comply with said contract in respect of the quality of the water to be furnished and in respect of the pressure required to be maintained upon said mains, these respondents say that complainant is not entitled to any relief by virtue of its terms; and that these respondents are released from its obligations.

Respondents say that it is immaterial whether the said city has received for the past fourteen years without complaint, water from the Vicksburg Water Supply Company of a like character with that furnished by the Vicksburg Water Works Company, but they deny that the water which has been furnished by the Vicksburg Water Works Co. is of as good quality as that provided by the old company. How-

40 ever that may be, these respondents are charged with a trust to the people of the City of Vicksburg, and if their predecessors have been false to their duties heretofore, and failed to discharge their obligations to the public, it is no reason or excuse that the present Board of Mayor and Aldermen should continue a dereliction of its duty.

It has been the history of the corporations which have acquired and seized upon the public utilities, that they have sought to evade as far as possible their liabilities and to incur the minimum of expense in the exercise of the public privileges possessed by them, and have notoriously sought to press to the furthest limit their exaction from the public and their encroachments and monopoly of franchises, and the history of said complainant in dealing with the City of Vicksburg is not an exception to the general rule.

Respondents deny that they have arbitrarily, unjustly and illegally proceeded to adopt an ordinance and a resolution assuming to abrogate and take the franchise and contract rights of the complainants, as averred iterum iterumque in complainants bill.

They deny that the resolution referred to was adopted in pursuance of any purpose or desire to become the owners of said water works.

Your respondents admit that the averments in said bill that an act of the Legislature was passed authorizing the City of Vicksburg to issue bonds for the purpose of constructing a city hall and a sewerage system, and also for the purpose of either purchasing or building a water works system, and authorizing the issue of one hundred and fifty thousand dollars (\$150,000) for the latter purpose, but respondents say the question of liability of the city to complainant by virtue of the contract entered into with Samuel R. Bullock & Company which is raised by said resolution, is altogether aside from the scheme and purpose of becoming the owners by purchase or otherwise of a system of water works; they say that said alleged contract with Samuel R. Bullock & Co.,

41 imposes upon the inhabitants of Vicksburg and its authorities an onerous and extortionate burden, that no such contract would now be made with the said Vicksburg Water Works Company, or any other company, at the rates prescribed in said ordinance; that they far exceed the average price charged for water in cities situated in like condition and circumstances to Vicksburg.

That the question of liability of said city to complainant does not depend upon said act of the Legislature; that the resolution adopted by said board was not adopted in pursuance of said act; that whether the city is obliged under said alleged contract, is a question which is not affected by or dependent on either the resolution of said board or said act of the Legislature; that it is immaterial whether the said act of the Legislature had been passed or not or whether your respondents desire to become the owners of water works, it would still be and is the obligation on the part of these respondents, in the discharge of their public duties to deny that they are bound to said complainants by said contract, for they are informed and believe and now charge the fact for the many

reasons herein set forth that no liability exists on the part of said city, by reason of said contract.

Respondents further show that they have proceeded with this matter conservatively and justly towards the complainant; that it was after mature deliberation and upon the advice and opinion of two legal firms, and upon the opinion of the city attorney, that they were not bound by said contract, that the resolution in question was by them adopted.

That said resolution upon its face provided that reasonable compensation should be paid to the complainant for the use of water provided by hydrants for fire purposes.

Respondents admit that in pursuance of said act of the Legislature, an election was held to determine whether bonds should be issued for the purpose of building a city hall, of constructing a sewerage system and of buying or building a water works, but they deny that they have at any time by reason of said election or otherwise confederated or conspired with

42 anyone to injure or destroy the credit of the Vicksburg Water Works Company or that they have assumed to abrogate or take away the franchise and contract rights of said company or have persistently and unlawfully endeavored to disable said company from carrying on its business and to destroy its credit and the value of its property and to coerce said company to sell its water works to the city for an inadequate price.

That the averments in said bill in this respect, as contained in the thirteenth, fourteenth and fifteenth paragraphs, and particularly in the thirteenth paragraph, is predicated of said resolution evince a rare capacity for distortion if such a resolution could be capable of such distortion. Said averments particularly in paragraph thirteenth, these respondents say, are mere "words" dealing in vague and indefinite generalities, that they are but a crude adaption of certain judicial utterances, which were employed as legal conclusions and deductions from the proof of facts in a certain case. If said complainant means to charge these respondents with any other act of conspiracy or otherwise to injure the complainant than the adoption of said resolution, then these respondents once and for all deny each and singular all of said imaginary acts.

They deny that they have done any acts for the purpose of disabling the complainant from carrying on its business or to

compel it to sell its property at an arbitrary price or to cast a cloud upon its title.

Respondents admit that on the seventh day of November a resolution was adopted by them as averred in the sixteenth paragraph of said bill; but they submit that it is a gratuitous assumption on the part of complainant to designate it in the several parts of said bill as "a resolution and an ordinance." It is to be known by its terms and its import is to be gathered from its face and its character and purpose cannot be changed by any adroit appellation by which it may be designated.

Respondents say that the "wreck and ruin" which
43 may be impending to said water works should "said act of the Legislature and said resolution be permitted to stand" as averred in the said bill is no legal ground to question the validity of either said act or resolution.

That the consequences which complainant must face flow from the measure of its legal rights, dependent upon the sole question as to whether any contract exists between said city and said complainant.

Respondents deny that said resolution was adopted by them and that the suit in the Chancery Court of Warren County for cancellation of said contract was instituted by them in pursuance of said act of the Legislature and that they were done either to injure the property of complainant or to coerce it to sell said works at an inadequate price; they say that said act authorizing the said issuance of bonds to build water works also provided for the construction of a sewerage system, but upon the condition that said city should own system of water works which they were authorized either to purchase or erect at its own cost; that said act merely confers authority upon respondents which is optional with them, but is not mandatory nor obligatory upon them to take such action; they say that said bill does not charge that said city intends to build any works or has taken any action for that purpose. In fact respondents say that the wisdom and policy of building any works cannot be considered and determined until it be first ascertained whether they are bound to complainant by said contract.

That before the question of building a sewerage system and water works can be entertained by them, they deem that it is proper that there should first be settled their liability, if any, under said contract; they consider that it is their duty as public

servants to test said question, not only because of the onerous terms of said contract, but also because the public welfare requires that said question be settled, for they might justly conclude [conclude] that it would be unwise to build a
 44 system of water works in case it should be decided that they are bound by said contract, though they may have the legal right to build.

That while they consider that it is desirable to build a sewerage system, and as a condition they should own the water works, and that it is desirable that the plant of complainant should be purchased by said city at a reasonable and liberal price, yet they say that the very question of the liability of the city under said contract renders any negotiations with said complainant looking to such purchase impracticable, that they owe it as a public duty to have the question of their liability determined before any further effort be made to purchase said water works from said complainant. So that they say, that said resolution was not adopted in pursuance of said act of the Legislature, or by virtue of it, but solely to test said question, as an official duty which they owe, first, that they should not acknowledge a burdensome liability upon the tax payers which they do not believe to exist, and, second, that they might act advisedly in determining what action if any should be taken by them in the exercise of the authority to build or buy a water works plant.

Respondents say that while the averment in said bill, that the amount of bonds authorized to be issued for water works, to-wit, the sum of one hundred and fifty thousand dollars (\$150,000) is an inadequate sum for the price of complainants plant is immaterial, yet they deny that it is an inadequate price, and they aver and charge the fact to be that said plant is not worth more than one hundred thousand dollars (\$100,000) if that; that a new plant in many respects superior to the present one, they are informed, can be built for one hundred and twenty-five dollars (\$125,000); that the old plant has been in operation for fifteen years, or about one-third of the average life of such plants, while all the boilers, engines and pumps belonging to it are nearly worn out and are of
 45 little value; they deny that they have done any act for the purpose of depreciating the value of said property or to coerce it to sell its property at an inadequate price.

Respondents say that while they have denied their liability under said contract, yet they have offered to pay complainant a reasonable and just compensation for the use of hydrants. But that which is reasonable and just to common mortals seems not to be palatable to the greed of a monopoly.

They say that the average gross income of said works now exceeds thirty thousand dollars (\$30,000) per annum and its net income is more than twelve thousand (\$12,000), of which the payment by the city under said contract amounts to about eight thousand dollars (\$8,000).

That the proposition of the city to pay said complainant pending the litigation to test its liability fifty dollars (\$50) for each hydrant would amount to six thousand dollars (\$6,000) there being one hundred and twenty-two hydrants, and so they emphatically deny that any act done by them or proposed to be done by them, would disable complainant from carrying on its business or work "wreck and ruin" upon its property, aside from the natural consequences which might follow if it be found that said city is not bound by a contract with complainant.

Respondents admit that they addressed a communication at the instance of the advisory board, asking the complainant if their water works could be purchased. The reply of said complainant to said inquiry is characteristic, a copy of which is herewith appended marked Exhibit "—"

Respondents further answering say that they are not advised how nor when the office holders and seekers from the mayor down dragged the water works into politics; that all of the matters stated in the 19th paragraph of said bill in this respect are wholly immaterial, irrelevant and insufficient.

That these respondents deny that anything was ever stated in this regard by said mayor or other office holder
 46 by the authority of these respondents or in pursuance of any act of theirs; and as representatives of said municipal corporation. They are not responsible nor are they to be held by any declarations of individuals whether they be office holders or office seekers; but there were no statements or publications during said canvass which were false, and though it is immaterial and irrelevant matter, these respondents nevertheless state the fact to be that, while a majority of the said Board of Mayor and Aldermen were in favor of adopting the resolution which was passed in Novem-

ler, that nevertheless there were certain members of said board who opposed the adoption of said resolution in the interest of the said complainant, and not in the interest of the public.

That the averment in said bill to the effect that publications and declarations were made by candidate for office that if elected they would bring suit to cancel said contract, is an absurd charge upon its face, for it was long before said election was held that the then Board of Mayor and Aldermen adopted said resolution whereby they deny their liability under said contract, and that it was in pursuance of that resolution that a suit was instituted to cancel said contract.

Your respondents say that while the matters averred in the 20th and 21st paragraphs of said bill are wholly irrelevant and immaterial nevertheless they are informed and believe and charge the fact to be that one M. O. Crumpler, who was the agent and promoter of the Water Works Company, complainant, was advised in the city of Vicksburg by the then superintendent of the Vicksburg Water Supply Company of the purpose to authorize the city to buy said works; that he was informed of the details of said proposed litigation.

Respondents deny the vague and indefinite charges that inflammatory and untruthful articles were written against said Water Works Company and that rumors of damaging effect which were utterly false were circulated by them; though sheltered in indefinite terms and although irrelevant and immaterial, they deny that they were written, circulated or were put afloat by these respondents, or their officers or agents or in pursuance of any conspiracy against said company.

These respondents say that the averments in the 22nd paragraph while they are immaterial and irrelevant are wholly untrue and they deny that any member of said advisory board ever made any proposition to buy said water works for himself or his associates.

They admit that Mr. E. C. Carroll, a gentlemen [gentleman] of probity and of honor, was requested by a foreign corporation to open negotiations for the purchase of said works, that he, the said E. C. Carroll, had no interest whatever in said negotiations.

Your respondents say, of this matter, that they never heard of it until after complainant had filed his bill.

They say it is true that a suit was instituted in the Chancery Court of Warren County, Mississippi, against complainant, by the City of Vicksburg to have such contract declared void, and it is true that it was done at the instigation of said Board of Mayor and Aldermen, because it goes without saying that the acts which one may do are instigated by himself, but it is not true that such suit was instituted in confederation with said leading citizens as insinuated in said paragraph.

Your respondents say to the 25th and 28th paragraphs of said bill that the matters averred and contained are irrelevant, immaterial and multifarious and constitute no ground for relief and the legal sufficiency thereof is now submitted to the Court as if especially demurred to.

Your respondents admit for the use of fire hydrants a price was stipulated to be paid by the Mayor and Aldermen to the said Samuel R. Bullock & Company; they deny, however, that the amount which is due under said ordinance was due to the complainant, and they deny that these respondents
 48 offered to pay to the said complainant an inadequate amount or price for the use of said hydrants.

They deny that their proposition to pay a reasonable compensation to the said complainant was "a scheme by which they confederated, conspired and endeavored to coerce and force complainant into an act whereby the ordinance would be annulled." It is an absurd legal proposition that the offer by the city to pay the complainant \$50.00 a year for a hydrant pending the litigation as to whether there was any contract would amount to any waiver of the rights of their property, and it was perfectly competent for the said complainant to have accepted such payment on account.

These respondents show the fact to be that during the month of January, 1901, the Mayor and Aldermen by resolution referred water works bills to a committee, that said committee sought to have an agreement with the management of said Water Works Company as to what should be paid by way of a reasonable compensation pending said litigation; that said company refused absolutely to take anything less than the amount which was stipulated in said contract, although they proposed to give bond to cover whatever excess the Court might find in such payments; that at the last meeting of said committee, the superintendent of said company and its attorneys were present, and as they had refused to make any other

concession the report of said committee, which is set forth in said bill, was adopted.

That at that time they did not object to the form of said report and that their rights would be concluded by the acceptance of the \$50.00, which respondents show is the prevailing rate at Shreveport, Natchez and Meridian.

They admit that said report was adopted by the Board of Mayor and Aldermen and that there was a reservation that said payments should not affect the rights of said city, and it is necessarily and legally followed that the rights of the complainant would not also be thereby impaired. However this may be, on the next succeeding day, to-wit, on February 13th, 1901, there appeared in the of the papers of the City of Vicksburg the following paragraph:

"There appeared an article in our paper yesterday to the effect that it was reported that Mr. Crumpler stated that he would cut off public hydrants, after reasonable notice was given to the city and underwriters, if the city did not pay the company's bill due on the first of January. Mr. Crumpler authorizes us to say that what he stated was substantially as follows: "The city's proposition to pay the company was only a partial payment and that it was so worded and hedged about that if accepted by the company, it would make the company commit an act that would be a false position with reference to the contract with the city, and might be construed the breaking of the contract, and for those reasons the company could not accept under the conditions offered by the city, and that if the city continued to refuse to pay except under those conditions it would soon put the company in a position that it could not furnish water any longer for fire protection, and that it did not want to do this, but would be forced to do so."

That at once and before the filing of this bill and some days before the fiat was obtained for the injunction which was issued in this suit, to-wit, on February 14th, 1901, the Mayor of the City of Vicksburg, seeing said paragraph and being advised for the first time that the said complainant objected to said resolution on that ground addressed and delivered to Mr. M. O. Crumpler the following letter:

Mr. M. O. Crumpler, Supt. of the Vicksburg Water Works Co.

Dear Sir:—I notice in the Evening Post what purports to be

a statement from you to the effect that the offer of the city to pay you \$50.00 for the use of fire hydrants was made upon such conditions as you could not accept. It is my understanding, and I am so advised also by the city attorney, that it was not the intention of the Mayor and Aldermen to impose any conditions by which your rights in the controversy with the city should be in any way effected. I am therefore prepared to take your receipt for said payments, stipulating that your rights in the premises shall not be impaired or waived by accepting payment as aforesaid.

Very respectfully,

(Signed) W. L. TROWBRIDGE, Mayor.

That this communication was made in a spirit of fairness to the said complainants, that they might be amply compensated pending said suit for the use of their fire hydrants.

The complainant has charged these respondents with "endeavoring to disable it from carrying on its business, with destroying its credit and the value of its property, with coercing it to sell its water works for an inadequate price and of otherwise of carrying on an unlawful conspiracy and doing other illegal and unlawful acts in furtherance of said conspiracy," but has not specified a single act on the part of the city evincing such purpose, and while said charges are vague and indefinite and do not call for an answer in the manner and form in which they are pleaded, nevertheless these respondents say, as to such charges, that they deny that they have done or authorized to be done by any one, and [any] act evincing any such purpose or desire. That the City of Vickburg is responsible in its corporate capacity as a municipality for the acts of its officers done by them under the guise and color of authority, but not otherwise.

Respondents further answering, say that the matters and things contained in complainant's amended and supplemental bill are irrelevant, immaterial and afford no ground of relief to the complainant and their legal sufficiency is now submitted to the Court and judgment thereof is craved as if formally demurred to; and respondents further answering, say: That there does not appear any ground for the equitable relief sought by the complainant by reason of the matters and things averred in its original and amended bills; and now having fully

51 answered, defendants pray to be dismissed, hence with their reasonable costs and with damages for the wrongful suing out of said injunction, a bill of particulars whereof is herewith filed.

State of Mississippi,
County of Warren,
City of Vicksburg.

Western Division of Southern District of Mississippi.

Personally appeared before the undersigned, an U. S. commissioner in and for said Western Division of Southern District of Mississippi, W. L. Trowbridge, Mayor of the City of Vicksburg, who being by me duly sworn, on oath states on behalf of the defendants that the matters and things stated in the foregoing answer as of his own knowledge are true and correct as therein stated, and such as are stated on information and belief he verily believes to be true, and that the matters affirmatively alleged and pleaded are true in fact and that this answer is not interposed for the purpose of delay.

W. L. TROWBRIDGE,
Mayor of the City of Vicksburg, Miss.

Sworn to and subscribed before me this the 21st day of June, 1901.

[Seal]

JOSEPH H. SHORT,
United States Commissioner.

We hereby certify that in our opinion the demurrers and pleas set forth in the foregoing answer are well founded in point of law, and that same are not interposed for delay.

MAGRUDER, BRYSON & DABNEY,
Sol's for Defendants.

FINAL DECREE.

Vicksburg Water Works Company
vs. Equity. No. 41.
Mayor and Aldermen of the City of Vicksburg, Mississippi.

This day this cause came on to be heard in accordance with the motion of complainant and defendant filed January 12th, 1904, and the order of this Court on the hearing of said motion rendered the said January 12th, 1904, upon the original bill, amended and supplemental bill, exhibits, answer of defendants, proofs and exhibits, and the Court, after hearing and attending the evidence and the arguments of counsel and being fully advised in the premises and being satisfied that the complainant is entitled to the relief prayed for in its original and amended and supplemental bills and for full relief, it is thereupon hereby ordered, adjudged and decreed:

First. That the defendant, the Mayor and Aldermen of the City of Vicksburg, be and is hereby perpetually enjoined from abrogating or taking away, or from assuming to abrogate or take away, the franchises or contract rights of complainant under and by virtue of the ordinance, franchise or contract of said defendant, entitled "An ordinance to provide for a supply of water to the City of Vicksburg, in Warren County, Mississippi, and to its inhabitants contracting with Samuel R. Pullock & Company, their associates, successors and assigns for a supply of water for public use and giving the said City of Vicksburg an option to purchase the said works," ordained the 18th day of November, 1886, approved by John W. Powell, Mayor, November 19th, 1886, being the ordinance contract and franchise marked Exhibit "B" to the original bill of complaint, and said ordinance, contract and franchise being specifically and accurately set out in words and figures in the pleadings, which ordinance, contract and franchise was acquired by and is the sole and exclusive property of said complainant.

Second. That said ordinance, contract and franchise be and is hereby declared and held to be in all and every respect legal, valid and enforceable and binding upon said defendant, and said defendant is hereby perpetually enjoined from infringing,

52 ignoring, rescinding, or denying liability under said ordinance, contract and franchise, in any of its parts or from in any manner disturbing or interfering with the rights, privileges and benefits acquired by defendant thereunder.

Third. That said defendant be and is hereby directed to rescind its resolution and ordinance adopted the 7th day of November, 1900, which is in words and figures as follows:

Resolved, "That the Mayor be and is hereby instructed to notify the Vicksburg Water Works Company that the Mayor and Aldermen deny any liability upon any contract for the use of the water works hydrants. That from and after August, 1900, they will pay reasonable compensation for the use of said hydrants. That the city attorney take such action as shall be necessary to determine the rights of the city in the premises."

And also to rescind the ordinance or resolution of said defendant adopted the 7th day of February, 1901, when the said defendant adopted the report of the committee on water works as set out in the pleadings.

Fourth. That the said defendant refrain from in any manner accepting the benefits of or proceeding under the act of the Legislature of the State of Mississippi, approved March 9th, 1900, and from issuing bonds under and by virtue of said act or any other act, or ordinance for the purpose of erecting water works of its own during the period prescribed in said ordinance contract and franchise.

Fifth. That the said defendant refrain from constructing water works of its own until the expiration of the period prescribed in the said ordinance contract and franchise dated 18th day of November, 1886.

Sixth. That the said defendant be and is hereby required to pay all moneys due or owing or that may hereafter be due or owing to said complainant under and by virtue of said ordinance, contract and franchise.

Seventh. That the said defendant be and hereby is per-

petually enjoined from making or adopting any resolution or ordinance refusing to pay the contract price of water
 54 fixed by said ordinance, contract and franchise, until the expiration of the period prescribed in said ordinance, contract and franchise.

Eighth. That the said defendant be and is hereby enjoined from permitting any further connections for the conveyance of sewerage or excremental matter with the storm sewer or culvert located on Washington Street, City of Vicksburg, (and the defendant is hereby directed and commanded within twelve months from this date to extend said sewer or culvert and construct an outlet therefor so as to discharge said sewerage and excremental matter into the Yazoo or Mississippi River below the intake pipe of complainant, provided that if the defendant is unable to construct or extend said sewer or culvert and construct said outlet within twelve months from this date, it can apply to this Court for good cause shown for an extension of time beyond the said period of twelve months).

Ninth. That said defendant pay the costs of this cause to be taxed.

Ordered, adjudged and decreed this the 18th day of May, 1904.

H. C. NILES, Judge.

The above and foregoing has the following indorsement thereon, to-wit:

119 Equity. Vicksburg Water Works Company vs. Ex.
 "A" to Answer. Mayor and Aldermen of the City of Vicks-
 burg. Filed and entd. April 1, 1912. L. B. Moseley,
 55 Clerk. J. H. Short, D. C.

56 In the District Court of the United States in and for
the Western Division of the Southern District
of Mississippi.

W. A. Henson, Receiver,

vs.

No. 119. Equity.

Mayor and Aldermen of the City of Vicksburg, ———.

Now comes the complainant in the above entitled cause and by way of amendment to his original bill and supplemental thereto files the following as his amended and supplemental bill, to-wit:

That complainant was duly and legally appointed receiver of the property, business and affairs of the said Vicksburg Water Works Company by decree of this Honorable Court rendered on the 28th day of December, 1910, in a certain suit therein under the name and style of Citizens Bank & Trust Company vs. Vicksburg Water Works Company, No. 111 Equity, on the docket of said Court, and was under the terms and provisions of said decree vested with the possession, management and control of the property, business and affairs of the Vicksburg Water Works Company and since said date has so continued and is now in the sole and exclusive possession and control thereof.

That all the property of the said Vicksburg Water Works Company is situated in the City of Vicksburg, Mississippi, and is assessed for taxation in said city; that as such receiver complainant paid taxes upon said property for the year of 1911 and should his appointment continue will pay taxes thereon for the year of 1912, and for such succeeding years as he may continue to perform and discharge the duties of such office.

That by reason of the facts stated complainant is advised that he is a taxpayer of said city and is entitled to all
57 the rights, privileges and benefits accruing and appertaining to such.

That among other properties owned by the Vicksburg Water Works Co., and now under the charge and control of complainant is a certain contract franchise granted by said defendant to Samuel R. Bullock & Company, and their associates, successors and assigns on the 18th day of November, 1886, and

accepted by the said Samuel R. Bullock & Co., a copy of which is herewith filed, marked Exhibit "A" and made a part hereof.

That by successive transfers and assignments the said contract has passed from Samuel R. Bullock & Co. to the said Vicksburg Water Works Company, which said company is now the owner thereof, and through it complainant is entitled to all the rights, privileges and benefits granted therein by the said defendant city to the said Samuel R. Bullock & Co.

That by terms of said franchise it is provided among other things in section one thereof as follows:

"That in consideration of the public benefit to be derived therefrom the exclusive right and privilege is hereby granted for the period of thirty (30) years from the time that this ordinance takes effect unto Samuel R. Bullock & Co., their associates, successors and assigns of erecting, maintaining and operating a system of water works in accordance with the terms and provisions of this ordinance, and of using the streets, alleys, public squares and all other public places within the corporate limits of the City of Vicksburg, Mississippi, as they now exist or may hereafter be extended, and within such other territory as may now or hereafter be under its jurisdiction, for the purpose of laying pipes, mains, and other conduits and erecting hydrants and other apparatus for the conducting and furnishing an adequate supply of good wholesome water to the City of Vicksburg, Mississippi, and to its inhabitants for public and private use and for making repairs and extensions to the said system from time to time during the period in which this ordinance shall be in force.

58

That the said contract further provides in Sec. 9 as follows, to-wit:

"At the expiration of each period of ten years after this ordinance takes effect the Mayor and Aldermen of the City of Vicksburg shall have the right and privilege to purchase the said water works, provided they notify the said Samuel R. Bullock and Company, their associates, successors or assigns of their intention so to do, at least one year before the expiration of said period of ten (10) years.

The value of the said system shall be ascertained as follows: The said Samuel R. Bullock and Company, their associates, successors or assigns, and the said Board of Mayor and Aldermen of the City of Vicksburg shall severally appoint one per-

son, the two appointed shall choose a third, and the three persons thus chosen, who shall be hydraulic engineers, shall constitute a board to determine the value of the said system of water works. * * *

That the necessary import and meaning of the provisions of said contract above set out is that the said defendant obligated and bound itself for the period named, first, to allow the said Samuel R. Bullock & Co. the exclusive use and occupation of the streets and public places in the said defendant city for the construction, maintenance and operation of a system of water works; second, that it would not itself construct, maintain or operate a system of water works unless it should buy the system constructed by Bullock & Co. or their successors. The defendant is as much bound not to construct as it is not to maintain or operate. The city protected itself by reserving the right to purchase the Bullock & Co. plant at intervals of ten years. This protection was made perfect and complete by a further provision in said section nine as to how the price of the existing plant should be ascertain [ascertained] and fixed.

That the said defendant having precluded itself from becoming [becoming] the owner of a water works system during the life of said franchise contract, any attempt upon its part to construct a system of water works or to otherwise become the owner of a water works system, except by purchase of the Bullock system within said period, necessarily impairs the obligation of said contract and is therefore in violation of Sec. 10 of Art. 1 of the Constitution of the United States, which provides as follows:

59

"No State shall * * * pass any * * * law impairing the obligations of contracts."

That nevertheless the said defendant, after entering into said contract, and after the Vicksburg Water Works Company, of which complainant is receiver, had become the owner of said Bullock franchise and works, undertook to abandon the said contract and to free itself from the obligations thereby imposed and to that end procured the passage of an act of the Legislature of the State of Mississippi, authorizing and empowering it to build a water works system of its own and to operate the same and afterwards by resolution declared itself free from any and all obligations to the said Vicksburg Water

Works Company by reason of said contract, whereupon the said Vicksburg Water Works Company filed a bill in the Circuit Court of the United States in and for the Western Division of the Southern District of Mississippi, entitled "Vicksburg Water Works Co. vs. Mayor and Aldermen of the City of Vicksburg," and numbered 41 on the equity docket of said court, setting up and averring in substance that the action of the city in undertaking to build and operate a water works system on its own behalf during the life of the said Bullock franchise had impaired the obligations thereof contrary to said Sec. 10 of Art. 1 of the Constitution of the United States above mentioned. And thereupon the said Water Works Company prayed an injunction against the said defendant restraining it from constructing a water works system, or from taking any further steps to that end. A copy of said bill of complaint is herewith filed, marked Exhibit "B" and made a part hereof.

That the said bill of complaint, among other averments, contained the following in regard to the construction of a new water works system, to-wit:

"On the 9th day of March, at the instance of the defendant, the Legislature of the State of Mississippi, passed an
60 act as aforesaid, entitled "An act to authorize the Mayor and Aldermen of the City of Vicksburg to issue bonds to the amount of \$375,000.00, to purchase or construct, equip and maintain a water works system, etc., while said contract and ordinance entered into with said defendant, the city, was still in force, and the conditions thereof being performed by both parties without complaint from either."

That after the filing of said original bill in the United States Circuit Court, a copy of which is herewith filed, marked Exhibit "B" and made a part hereof, the said Vicksburg Water Works Company filed its supplemental bill thereto, in which, among other things, it averred:

"Your orator would respectfully state that since the passage and approval of the act of the Legislature entitled "An act to authorize the Mayor and Aldermen of the City of Vicksburg to issue bonds to the amount of \$375,000.00, to purchase or construct, equip and maintain a water works system * * * and in accordance with its terms and provisions a pretended election was held on the 3rd day of July, 1900, under the au-

thority — of a pretended resolution passed by the defendant on the question of bonding the city for said amounts and purposes was pretended to be submitted to the registered and qualified voters of said city under its act, which provisions were carried. * * *

That it was further averred in said supplemental bill:

"Said city by its contract with S. R. Bullock & Co. and assigns are precluded from issuing and selling bonds to build, construct, maintain and operate a water works of its own, as provided by said legislative act and said resolution and said election of 1900, in competition with your orator against its own contract."

A copy of said supplemental bill is herewith filed as Exhibit "C" and made a part hereof.

The prayer of said original bill, among other things, contained the following:

"That said act of the Legislature of the State of Mississippi adopted on the 9th day of March, 1900, * * * be decreed to impair the obligations of said contract between said city and said Bullock & Company and their assigns, and to cast a cloud upon the title, franchise, and rights of complainant, and to be invalid and of no effect as against your orator."

That the prayer of the said supplemental bill, among other things, contained the following:

"The premises considered, your orator prays that this Honorable Court will enjoin the defendant from issuing and selling bonds for the purpose of building and constructing water works of its own in competition with your orator and in addition thereto that this Honorable Court will decree said act, resolution and election to be invalid and unconstitutional, and that the defendant be precluded and restrained and enjoined from constructing water works of its own in said city, until the expiration of your orator's contract."

61 That the said defendant filed and [an] answer to the said original and supplemental bills admitting the passage of said act of the Legislature authorizing said city to

issue bonds for the construction of a new water works plant, and that it had held an election under said act to authorize and empower its Board of Mayor and Aldermen to issue bonds as provided for in said act. A copy of said answer is herewith filed, marked Exhibit "D" and made a part hereof.

That the said answer among other things provides as follows:

These respondents (meaning Mayor and Aldermen of the City of Vicksburg) admit that there is a provision in the contract made between the city and Samuel R. Bullock & Co., whereby the exclusive right is given to Samuel R. Bullock & Co., their successors and assigns for the period of thirty (30) years to maintain a system of water works and to supply said city and its inhabitants with water. * * *

These respondents nevertheless say that no power was ever conferred either directly or indirectly upon said Mayor and Aldermen whereby they were authorized to grant by contract, to any person or persons the exclusive privilege for any period of time to furnish and supply said city and its inhabitants with water. That said provision in said contract is unauthorized, illegal and void and respondents submit that so much and such parts of said bill as is set forth in said provisions, in said contract, are insufficient to constitute any ground of relief, and they pray judgment thereof, and crave the same benefit of this objection as if formally demurred to.

The said answer further stated:

Your respondents admit the averments in said bill that an act of the Legislature was passed authorizing the City of Vicksburg to issue bonds for the purpose of either purchasing or building a water works system. * * *

Respondents admit that in pursuance of said act of the Legislature an election was held to determine whether bonds should be issued for the purpose * * * of buying or building a water works."

That upon the said original and supplemental bills and the answer of the defendant thereto, and the evidence taken in support of the issues thereby raised, a final decree was rendered by the United States Circuit Court, a copy of which is herewith filed, marked Exhibit "E" and made a part hereof.

That said final decree, among other things, provides as follows:

"This day this cause came on to be heard in accordance with the motion of complainant and defendant filed Jan'y 12th, 1904, upon the original bill, amended and supplemental bill, exhibits, answer of defendant, proof and exhibits, and the Court after hearing and attending the evidence and the argument of counsel, and being fully advised in the premises * * * it is thereupon hereby ordered, adjudged and decreed:

* * * * *

"Second. That said ordinance, contract and franchise be and is hereby declared and held to be in every respect legal, valid and enforceable, and binding upon said defendant, and said defendant is hereby perpetually enjoined from infringing, interfering, rescinding, or denying liability under said ordinance, contract and franchise in any of its parts, or from in any manner disturbing or interfering with the rights, privileges and benefit acquired by complainant thereunder.

* * * * *

"Fifth. That said defendant refrain from constructing water works of its own until the expiration of the period prescribed by ordinance, contract and franchise, dated the 16th day of November, 1886."

That the defendant prosecuted an appeal from said decree to the Supreme Court of the United States and to that end filed its assignment of errors, a copy of which is herewith filed, marked Exhibit "E" and made a part hereof.

The said assignment of errors among other things provides as follows:

"The said court erred in perpetuating by its final decree the injunction restraining it from erecting a water works plant of its own."

That when the said appeal came on to be heard and determined by the Supreme Court of the United States, Justice Day, speaking for the Court, said of the issues raised by the assignment of errors:

"The assignments of error necessary to be considered are:

1. As to the alleged error of the court below in permitting a corporation known as the City Water Works & Light Company, which had intervened in the case, to withdraw from the files its original bill in the nature of a supplemental bill, and striking out certain testimony which had been taken concerning the same.

2. In enforcing the contract with the city in favor of the complainant, and restraining the city from erecting water works of its own during the term covered by the contract with the complainant.

3. In requiring the construction of the sewer by the city.

We shall proceed to notice these in the order named."

In discussing the second assignment of error set out above, the court said:

"We find no error in the decree of the Circuit Court enforcing the contract rights of the complainant and enjoining the city from erecting its own works during the term of the contract."

The opinion will be found in Vol. 202, pp. 453-473 of the Official Reports of the U. S. Supreme Court.

63 That said Circuit Court of the United States, where the said issue was joined and decided, is a court of competent jurisdiction and its said decree is final and binding upon the parties thereto and their privies, and the said defendant being one of the parties, thereby became and is bound by the said final decree, and is by it enjoined and prohibited from erecting or constructing a water works during the period covered by the said Bullock franchise.

Complainant now avers that by reason of the facts set out above, the question of the right of the said defendant to construct a water works plant of its own during the life of the said franchise is *res judicata*, and any attempt now before the expiration of said contract by said defendant to build a water works system (which it has already partly undertaken to do

by constructing water mains on Cherry and other streets), or to issue bonds for said purpose which it now proposes to do, is a flagrant violation of the plain terms of said decree; is in defiance and contempt of this court and of the Supreme Court of the United States, and it should be perpetually enjoined from constructing said water works system or from issuing said bonds until the expiration of said franchise.

Complainant further avers that even if the right of the city to construct a plant during the life of the Bullock franchise had not been raised and adjudicated in said suit above mentioned, that nevertheless the Court must now so hold, because the said Bullock franchise by clear and apt words grants to Bullock & Company the exclusive right during the said period of thirty years, first, of constructing a water works; second, of maintaining a water works, and third, of operating a water works. It follows necessarily that the defendant by granting to Bullock & Company the exclusive right precluded itself for the said period from exercising that right; that is, first, from constructing a water works; second, from maintaining a water works, and third, from operating a water works. The words, "constructing," "maintaining," and "operating," are joined or tied together by the conjunction "and," which denotes and unites co-ordinate elements.

64 The privileges granted must therefore be considered as having equal rank or importance, and the obligation not to build be considered and held just as important and as binding on the city as the obligation not to operate.

On the other hand, it was just as important to Bullock & Co. to protect themselves against the construction of another system of water works as it was against competition. It was highly desirable to protect the plant which Bullock & Company proposed to build from competition at the termination of the franchise period, either in procuring a renewal of the franchise or in serving the public, which a second plant would necessarily produce, and this was a further reason why Bullock & Company should insist on the contract precluding the city from constructing a plant prior to that time. While Bullock & Company were thus protecting themselves by the terms of the contract, the defendant was equally vigilant of the public's interest as against Bullock & Company and to that end obligated Bullock & Company and their successors to sell their plant to the city at a price to be fixed and determined

by three disinterested hydraulic engineers. This right to purchase recurred at intervals of ten years, and since the contract terminates in thirty years the last interval must be coincident with the termination of the franchise. The protection afforded the defendant by the contract at its termination is not the right to build a new plant and have it ready for operation as the defendant is now attempting to do, but to buy the Bullock plant in the manner detailed in Section Nine of the said franchise contract, which is herewith above set out. Of course, after the termination of the franchise, the defendant may construct a plant, if it so desires, but it cannot at an earlier date, because it agreed not to do so.

By these reciprocal provisions each party to the franchise was and is perfectly protected against oppression by the other. The defendant is precluded from building, but Bullock & Com-

pany and their successors are bound to sell if the
65 defendant desires to buy. The city cannot destroy

the value of the Bullock plant by constructing a competing plant, and on the other hand, the owners of the Bullock plant cannot compel the city to pay an unreasonable price or to grant a new franchise.

This provision to purchase was in its nature and effect an exclusive option to the defendant to terminate the Bullock franchise and was manifestly for the benefit and protection of the defendant, and it is inconceivable that three disinterested and competent engineers, one of whom to be chosen by the defendant and one by the company, would be biased in favor of or influenced by either or [of] said parties or would render any award except one that was right, just, fair and reasonable.

Complainant further avers that the said defendant has for many years sought to free itself from the obligations of the Bullock franchise and especially that portion of the same which obligates and binds it not to build a water works during the life of said franchise or to maintain or operate a water works of its own during said period unless it purchase the Bullock plant, as provided for in the franchise contract.

That within a very short while after the Vicksburg Water Works Company became the owner of the Bullock plant and franchise, something over eleven years ago, the defendant began active efforts to enable itself to construct a water works system of its own, and declared its freedom from the obliga-

tions of the Bullock franchise. Its action in this regard gave rise to Equity suit No. 41, above referred to, and when defeated in this suit it then undertook to regulate the rates to be charged by the Water Company and to fix the same materially under the rates specified in the said franchise, and thereby again forced the Water Works Company to resort to this Honorable Court for relief, and when again defeated, it shifted the scene of battle to the State court, where it filed a bill seeking to have the Water Company's said franchise forfeited and set aside, and here it again met with a restraining order from this court. It

66 next with some outward show of fairness made overtures to purchase the Water Company's plant, but even in this it was still unwilling to abide by the plain terms of the said franchise, in so far as the same required the price to be determined by hydraulic engineers who are by profession especially skilled in the valuation of such works, and insisted that lawyers, who are by profession and training wholly unskilled in such work, should be accepted as appraisers in valuing the property. When the Water Company had agreed to this substitution the defendant, still seeking to avoid its obligations to the Water Company and to deprive it of the benefit of its said franchise and to acquire its water works system at a price under the just and true value thereof, insisted that the lawyer arbitrators in arriving at a valuation of the property should consider only the physical properties owned by the Water Company and should exclude the value of the remaining portion of the franchise. A copy of the said proposition is herewith filed, marked Exhibit "G" and made a part hereof. The said proposition, as will appear by inspection, is in the alternative, the first being:

"(a) Shall fix the true present worth of the value of the physical property of the Vicksburg Water Works Company considered as a going plant."

"(b) Shall in fixing the sum allow nothing for future earnings nor franchise value."

And the second:

"(a) Shall disregard the above method in fixing the amount of their award."

"(b) Shall fix the true present value of the net earnings of the Vicksburg Water Works Company from — day —, 1911, to the 19th day of November, 1916."

"(c) Shall allow in addition the true present market value of the mains and other physical property of the company as if the franchise had expired, and without right to further operate its said plant."

It will be observed that under the first alternative the value of the franchise is expressly excluded, and under the second the going value is left out, and in addition the second requires the physical properties to be valued as salvage or
67 junk which they would be without the right to operate as a water works system. Following this effort on the part of defendant to set the Bullock franchise at naught and acquire the Water Company's plant without paying therefor true and just value, the defendant next offered to submit to the lawyer arbitrators to find merely the "true market value" of the Water Company's properties, and when the Water Company in reply suggested that under certain decisions of the Supreme Court of Mississippi there was a high degree of uncertainty as to whether a water works system, being the subject of market quotations and not being generally bought and sold in the markets of the country, possessed what is usually and technically known as a "market value," but that if defendant would agree that "true market value" means "due and just compensation," the Water Company would accept the offer. The defendant manifested its unwillingness to give such meaning to the words "true market value" by making no reply. Thus baffled in its attempt to get advantage of the Water Company in a purchase by arbitration, the defendant next made overtures to purchase at private sale without resorting to arbitration as provided in the said contract.

The Water Company met this proposition in good faith, and after some parley, offered its property to the defendant delivery to be made January 1st, 1913, at the sum of \$375,000.00, which offer it has kept open to the city to this date and still leaves the same open, though defendant has entirely ignored the same. The Water Company knew at the time it made the offer, and still knows, that its properties were and

are reasonably and justly worth a great deal more than the price asked. A valuation of said properties by Jno. W. Alvord, of Chicago, Ill., an engineer of great eminence and the highest qualifications, shows the same to be worth, as of Nov. 18th, 1911, the sum of \$618,000.00, as appears from a summary of his report to complainant submitted on the — day of February, 1912. A copy of said summary is hereto attached, marked Exhibit "II" and made a part hereof.

68 That during the fall of 1911, while the defendant was taking active steps looking to the construction of a new water works plant, the taxpayers, water consumers, voters and business man [men] of said city petitioned the City Council in writing to submit to the voters the question of whether the city should buy complainant's water works or build another system, and as an evidence of the popularity of the movement to permit the voters and not the defendant to determine whether the city should buy or build, it is a matter of common history, as well as of public record, as shown by the files in the possession of the defendant, that the number of signatures appended to the said petition was 1421, yet the said defen- [defendant] ignored the said petition and determined to call an election to authorize an issue of bonds to build without submitting the alternative proposition of buying the Water Company's plant.

Complainant avers and charges that this act of defendant in submitting to the voters only the proposition to build, was not because it intended to build, but because it considered that if it could induce the electors to vote for the bond issue it would thereby be given a club to beat the Water Company down in its selling price so it could acquire its said properties at its own arbitrary valuation, largely under their just and true value.

That said defendant with this end in view of [on] the 1st day of January, 1912, passed a resolution declaring its purpose and intention to construct a system of water works of its own, and to that end to issue \$400,000.00 of bonds to be by it executed and sold to raise funds for the construction of such plant, not to be operated, however, until the expiration of the Bullock franchise, and the said resolution further provided for the calling of an election to authorize the issuance of said bonds, the same to be held on the 14th day of February, 1912, upon which said date the defendant held said election,

and on the next day declared its election to have
 69 been carried and its Council to have been thereby
 authorized to issue said bonds for said purpose, and
 afterwards, to-wit, on Feb'y 19th, the said defendant passed
 an ordinance declaring said bond election to have been carried
 in favor of the issuance of said bonds, and itself to have been
 thereby authorized and empowered to execute and sell said
 bonds for said purpose.

Complainant avers that notwithstanding the declarations of
 said ordinance to the effect that said election had been legally
 held and carried, and that the said defendant had been thereby
 authorized and empowered to issue the said bonds, that the
 said election was illegal and void and conferred no authority
 whatever upon the said defendant to issue bonds for said
 purpose.

That if said defendant had the right to call and hold an
 election for said purpose, it was nevertheless incumbent on
 it to comply with the statutory requirements in that regard,
 but this the said defendant utterly failed to do.

That the charter of the City of Vicksburg, by amendment
 passed on the 1st day of May, 1905, approved by the Mayor
 on the 2nd day of May, 1905, and by the Governor on the
 3rd day of June following, provides among other things as
 follows:

"What is to be done before issuing bonds: Before the
 providing for the issuance of any bonds, the Mayor and
 Aldermen shall publish notice of the proposal to issue the
 same in a newspaper published in the municipality, for three
 weeks next preceding; and if, within that time, twenty per
 centum of the adult taxpayers of the municipality shall peti-
 tion against the issuance of said bonds, then the bonds shall
 not be issued, unless authorized by a majority of the electors
 voting in an election to be ordered for that purpose. All the
 expense of preparing the bonds, publishing notices and holding
 such election shall be paid out of the municipal treasury."

That under the foregoing charter provision it was essential
 for the Mayor and Aldermen of said defendant city before
 attempting to issue the said bonds, or to call the said bond
 election, to first give notice to the taxpayers of said city of
 the proposal to issue said bonds by publication in some news-

70 papers published in said city for three consecutive weeks before ordering the said election, but nevertheless the said Mayor and Aldermen purposely neglected and failed to make such publication.

That by reason of the said failure of the said Mayor and Aldermen complainant is advised that the said defendant was utterly without power or authority to hold said election, and that its attempt to do so was ultra vires, and that all the acts and doings of the said Mayor and Aldermen in that regard were and are utterly void, and that the said defendant city is now wholly without power or authority to issue the said bonds under and by virtue of said election or to take any further action looking to that end.

That having failed to publish said notice as required, the city undertook to have this error corrected by an act of the Legislature, which purported to cure the failure to give the said notice, and to authorize and empower the defendant to issue said bonds, notwithstanding its said failure. A copy of said act is herewith filed, marked Exhibit "I" and made a part hereof.

That said act was passed at the special instance, request and solicitation of the defendant and was rushed through the House of Representatives and the Senate with precipitate haste at defendant's urgent demand and was written and prepared by said defendant and was so worded that it only applied to said election.

Complainant now says that the said act itself was entirely void and without effect because it is local and special in its nature and effect, and undertakes to give relief which could be and is provided for by a general law. That it adopts a basis of classification which is purely arbitrary and by its terms excludes from its operation and effect, first, all cities of which have not held a bond of election, under Chapter 142 of the laws of 1910; second, all those which, having held a bond election under said Chapter 142, gave proper notice to
 71 taxpayers; third, all those cities which having held bond elections under said Chapter 142 and failed to give proper notice, and to otherwise comply with the statute, provided that they had sold and disposed of their bonds before the passage of the said act, thereby eliminating all cities except such as had held an election under Chapter 142 of the laws of 1910, and had failed to comply with the requirements

thereof, and had not at the time of the passage of the act sold and disposed of their bonds. That on the fact of the act above mentioned the said eliminations and exclusions from its operations make it local and special. That if mistaken as to the said act on its face appearing to be local and special, complainant further avers or and concerning it that it is limited in operation and effect to the defendant city alone, and complainant is informed and believes that it was purposely so limited; that the City of Vicksburg is the only city that has held a bond election under the laws of 1910, and has failed to comply with any of the requirements of the said statute. That the act is an attempt upon the part of the Legislature to circumvent and avoid the force and effect of Sec. 87 of the Constitution of the State of Mississippi, which provides as follows:

"No special or local law shall be enacted for the benefit of individuals or corporations in cases which are or can be provided for by general law; * * * nor shall the operation of any general law be suspended by the Legislature for the benefit of any individual or private corporation or association, and in all cases where a general law can be made applicable, and would be advantageous, no special law shall be enacted."

That while the foregoing constitutional provision may permit the suspension of a general law for municipal corporations, it must appear either that the suspension applies to every city in the State, or that a basis of classification has been adopted which has some reasonable foundation and is not purely arbitrary, and that the law applies to and includes all of every class which it affects. If the Legislature be permitted to adopt purely arbitrary classifications and constitutional provision would be rendered negatory and entirely without effect as no two cities are exactly alike in all particulars.

72 That while it doubtless is within the legislative discretion to say whether or not the evil sought to be remedied can be reached by a general law, still if the Legislature decide that it cannot, then then it is incumbent to pass the law as provided for special and local laws in Sec. 89 of the Constitution, which provides:

"There shall be appointed in each house of the Legislature a standing committee on local and private legislation; the house committee to consist of seven representatives; and the senate committee of five senators. No local or private bill shall be passed by either house until it shall have been referred to said committee thereof, and shall have been reported back with a recommendation in writing that it do pass, stating affirmatively the reasons therefor, and why the end to be accomplished should not be reached by a general law or by a proceeding in court; or if the recommendation of the committee be that the bill do not pass, then it shall not pass the house to which it is so reported unless it be voted for by a majority of all the members elected thereto. If a bill is passed in conformity of the requirements hereof, other than such as are prohibited in the next section, the courts shall not, because of its local, special or private nature, refuse to enforce it."

That the said curative act was not passed as a local or special law is required to be passed under Sec. 89, so that if in nature and effect it be local or special, it is void on account of such failure to so pass it.

That the question of whether said curative statute is local or special is a judicial one, and it is therefore for the court to determine what is the nature and effect of the statute, and if found to be local or special, it becomes the duty of the court to decree it null and void.

Complainant further shows that under and by the terms of Sec. 88 of the said Constitution of Mississippi, the Legislature was and is prohibited from passing any local or special law which has the effect of amending the charter of cities and towns, the section being as follows:

"The Legislature shall pass general laws, under which local and private interests shall be provided for and protected, and under which cities and towns may be chartered and their charters amended, and under which corporations may be created, organized, and their acts of incorporation altered; and all of such laws shall be subject to repeal or amendment."

That the effect of this section is to prohibit absolutely all local and special legislation with reference to cities and towns.

The Legislature has absolute control over municipal corporations, but it must exercise that control through general laws.

73 It may separate such corporations into classes for governmental purposes, but the basis of classification must not be arbitrary and must be grounded on conditions and facts which justify and require different remedies and rules of government, and a law to escape being local in effect must either apply to all cities and towns or must classify them on a legal basis and must apply to all of any class which it affects at all.

That the said curative statute above referred to amends the charter of the City of Vicksburg by dispensing with the requirements of the notice to taxpayers required by the charter of said city so as to enable said city to issue bonds without giving such notice to taxpayers, and for that reason the said curative statute is unconstitutional and null and void and the said bond election is not perfected thereby. *

Complainant further avers that the said defendant was without power or authority to hold said bond election for the further reason that it had already exceeded the limit of indebtedness allowed under the terms and provisions of Chapter 142 of the laws of 1910, which act by its terms prohibits all cities and towns in the State of Mississippi from issuing bonds or other obligations in excess of ten per centum of the assessed value of the taxable property therein, except such as then had a population of ten thousand or more. The exception being limited to cities which then had a population of ten thousand, and excluding all which might thereafter reach such population was and is arbitrary, and without a legal basis of classification and renders so much of said statute as purports to give to such cities an increased debt limit void as being in contravention of said section 87 and 88 of the Constitution of Mississippi.

That the outstanding indebtedness of the City of Vicksburg, including bonds which had already been voted for, but had not been issued, at the time of the election in question, was approximately ten per cent of the assessed value of all the property in said city, so that the said bonds voted for at the said election, added to those then outstanding, would
74 largely exceed ten per centum of the assessed value of the said taxable property, as shown by the assessment rolls of the said defendant.

That with the elimination of the part of said act which authorizes a bond issue to the extent of 15% of the assessed value of the property, the City of Vicksburg is impotent to hold an election for the issuance of the bonds in question, and for that reason the said election was void and of no effect.

Complainant further avers that the said bond election is void and should be set aside for the further reason that the same was called, held and conducted under what purported to be an ordinance amending the charter of the defendant passed and adopted on Nov. 6th, 1911, and approved by the Governor on ———, 1911, which said pretended ordinance was itself void and of no effect because it conflicted with and was antagonistic to the provisions of the said Chapter 142 of the laws of 1910.

Complainant further avers that the statute which prohibits cities from issuing bonds without an election to authorize the same in effect vests the power to issue bonds in the voters and makes the city itself a mere arbitrator between those voters who favor the issuance of bonds and those who oppose the same. The only power left in the city as a legal unity is to fairly and impartially test the sense of the voters. It would be unfair for the city as a legal unit to throw its weight and influence on either side and especially to permit it to divert the public funds or pledge its credit in favor of either side. The funds of a city are raised by taxation and belong as much to one class of voters as the other. Should the city pay out its public funds or pledge its credit to induce such voters to vote against the issuance of bonds, this would be unfair to those voters and taxpayers who favored such issuance and vice versa if the city should pay out its public funds or pledge its credit to induce the voters to vote in favor of a bond issue it would be equally unfair to those voters and taxpayers who opposed the same. The necessary effect of such action on the part of the city is to place those voters and taxpayers whom it opposes at an undue and unfair disadvantage as against those whom it favors, especially in that it enables the city to raise funds by taxation from tax-paying voters and to use such funds so raised against such voters without their consent and against their will and presumably against their interest. Such use of public funds is not merely a diversion of such funds from proper and legal channels, but it is a corrupt practice subversive of free gov-

ernment and against public policy, and as a matter of law is necessarily fraudulent and its legal effect, whether intended or not, is to taint with fraud any election where it takes place. It applies to the whole electorate and cannot be eliminated, because there is no practical method of determining to what extent its pernicious and corrupting influence has affected the election.

Complainant now charges that the defendant did as a matter of fact expend the public funds in its treasury and did pledge its credit in and about controlling the said bond election in favor of the issuance [issuance] of said bonds, and to that end did cause to be published and distributed among the voters who were qualified to vote at said election and among divers other persons a certain pamphlet entitled:

"This pamphlet contains the report of Messrs. A. L. Dabney and G. U. Borde, engineers, as to the cost of a new water works plant; the value of the plant of the Vicksburg Water Works Company to the City of Vicksburg, a comparison of the proposed system with the existing system, and a statement of the additions necessary to make the existing plant adequate to Vicksburg's needs."

"A careful reading of the pamphlet's contents will enable you to vote intelligently on the bond issue question of February 14, 1912."

That at the beginning of said pamphlet the defendant published a preface or open letter addressed

"To Vicksburg's Citizens,"

in which, among other things, is stated of and concerning the said bond election, the following:

"Should the issue bond be authorized, the city will build its own water works system unless the Vicksburg Water Works Company shall offer its present plant at a price deemed reasonable by the Mayor and Aldermen. If this shall be done, the bonds authorized at the forthcoming election will not be issued, but a new election will be held to determine whether or not the people of Vicksburg wish to purchase at the price deemed reasonable by the Mayor and Aldermen.

The whole question is of such importance that it should be finally determined by the people themselves."

That the said pamphlet also contained what purported to be an estimate of the cost of constructing a new water works plant, which said estimate left out certain necessary and well recognized elements of the cost of constructing such a plant among which complainant particularly calls attention to (a) interest on money invested in the proposed plant during the period of construction and until it commences to earn an income above operating expenses; (b) cost of service connections which the defendant has installed on so much of the pipe lines of its proposed plant as it has already constructed and will be compelled to put in on the remainder. That the on missions amount to not less than \$———, and were purposely left out so as to make it appear to the voters in the said election that the proposed water works for which the bonds were being issued would not cost over \$340,000.00, when the defendant at the time well knew that said plant could not be built for that sum, but that it would cost a great deal more.

That the said pamphlet also contained what purported to be an estimate of the value of the plant now in complainant's charge and control as receiver, and upon which he is now paying taxes to the said defendant, which pretended estimate purposely and by express terms left out and omitted the following elements of value necessarily pertaining to complainant's said plant, and properties, to-wit, (a) the value of complainant's franchise; (b) value of cost of service pipes, and (d) interest during construction, (e) going value which said omitted items aggregate the sum of \$———, and in addition to this the said pretended estimate left out many items of complainant's physical properties and grossly undervalued many others with the intent of making it appear that complainant's property did not exceed \$186,000.00 in value. The defendant at the time well knew that complainant's property greatly exceeded such value, and that it was reasonably and justly worth over three times the said pretended estimate. That this under-valuation of complainant's plant was for the purpose and with the intent of deceiving such voters as favored the purchase of complainant's plant by the defendant as to the merits of such plant and as to its just and reasonable value and to lead them by such

deception to Believe that it was not a bargain to the defendant at the price offered, and therefore to prefer to have the city build a new plant and therefore to vote for the bond issue.

That the said pamphlet also contained what purported to be a letter from the Mayor of Helena, Montana, to one of the Aldermen of defendant, in which letter it appeared in substance and effect that the said City of Helena had by holding a bond election and having itself authorized to issue bonds for the construction of a new water works been enabled to purchase the then existing plant in said city at a price satisfactory to said city and materially under what the owners thereof had previously demanded for the same. That this letter was published solely to induce voters to believe that by voting for and carrying the said bond election in favor of the issuance of the bonds the defendant would be given an advantage over complainant in its effort to buy complainant's plant.

That the said defendant after it had called said election caused 1700 copies of the pamphlet above referred to be published and 1600 copies of the same to be distributed among the electors in said city, which included practically every voter qualified to vote in said election, and in addition thereto caused to be published in divers newspapers which had a circulation therein, to-wit, The Vicksburg Evening Post, The Vicksburg Herald, and The Vicksburg Democrat, divers and many articles in tenor and effect the same as the subject-matter of the said pamphlet. That the manifest purpose and

78 necessary effect of the publication and circulation of the said pamphlet and the said newspaper article was to deceive a great many voters, and thereby induce them to vote for the issue of said bonds who would not otherwise have done so.

That many who were opposed to the issuance of said bonds, and would have so voted, were deceived by the false and misleading statements in said pamphlet concerning the cost of constructing a new plant, and were thereby erroneously and fraudulently led to believe that it would be advantageous to said city to construct a new plant at the said estimate, and being so misled were thereby caused to cast their ballots for the issuance of said bonds, but who would not have done so if they had not been so deceived by the said erroneous estimate as to the cost of constructing a new plant.

That many other voters who would have voted against the

said bond issue because they preferred to have defendant purchase complainant's plant at the price at which complainant was then offering to sell, were misled and deceived by the said false and fraudulent under valuation of complainant's plant, and deceived by the said false and fraudulent under valuation of complainant's plant and were thereby induced to believe that complainant's plant was not adequate to defendant's needs and not desirable, and being so misled and deceived, caused to change and to cast their ballots in favor of the issuance of the said bonds.

That the said pamphlet in substance, particularly in the address "To Vicksburg's Citizens" and the letter of the Mayor of Helena, wherein it suggested and held out the inducement to taxpaying voters that by voting for the said bond issue and by carrying the said election in favor of the said bond issue the defendant would thereby be enabled to beat down complainant in the price at which he was then offering to sell his plant to defendant, and to purchase the said plant at a reduced price which might be "deemed reasonable to the Mayor and Aldermen" of defendant, and in this event that the bonds would

"Not be issued but a new election will (would) be held to determine whether or not the people of Vicksburg wished to purchase at the price deemed reasonable to the Mayor and Aldermen."

changed many votes and caused them to vote for said bond issue who otherwise would not have done so.

79 That this suggestion was and is, as a matter of law, fraudulent and corrupt, because it is an indirect appeal to the cupidity of the taxpaying voters, because it suggests to them that the burden of taxation on them might be lightened to the extent of the saving made by a reduction in the purchase price of complainant's plant, and further because it diverted the true issues involved in said election, namely, as to whether or not the voters desired to vote bonds to build a new plant by setting up in its stead a false and fraudulent issue unknown to the law and not contemplated by the statute which authorized said election, namely, whether or not the defendant should be given power to build a new plant for the purpose of enabling it to drive a

bargain with complainant. That the necessary effect of thus diverting the mind of the voter from the true and proper issue in said election was to induce all those voters who desired to give the defendant such power and advantage to cast their ballots for the said bond issue, even though they were opposed to the defendant issuing bonds to build a new plant.

That the said suggestion and inducement above referred to became the most important issues in the said election and the subject of much argument in soliciting votes for said bond issue. That it was taken up and argued in the public press of said city and by the speakers at public meetings, and it was publicly and notoriously asserted that if the said bond election was carried for the issuance of said bonds that the same would not be used by defendant in the construction of a plant, but solely for the purpose of beating down complainant in his selling price. That in this way a great many voters who would have otherwise have voted against the bond issue were thus fraudulently and corruptly induced to change and cast their ballot in favor of said bond issue. That this inducement by the city was in the nature of a bribe to the tax-paying voters and as such illegal and corrupting in its effect.

Complainant further charges that the said defendant as a further means of controlling the said election and to cause the voters to cast their ballots for the issuance of said bonds procured, hired and paid for a number of automobiles, hacks and other conveyances on the day of the election to aid and assist in bringing out voters to the said election and in influencing them to attend the polls for the purpose of voting for the said bond issue and in the hiring of said automobiles, hacks and other vehicles the defendant boycotted and refused to employ such owners, chauffeurs, and drivers of the vehicles as well [were] not openly in favor of the issuance of said bonds and pledged to vote for the same.

Complainant is advised and charges that this action by the defendant in hiring said vehicles and employing the said owners, chauffeurs, and drivers to bring out voters to vote for said bond issue and in boycotting those who refused to cast their ballots or work to carry said bond election in favor of the issuance of bonds fraudulently caused a great many persons who would otherwise have voted against said bond issue to change and vote for the same.

Complainant further avers that since the said election the

defendant has paid for the publication of the said pamphlet and for part of the said newspaper publications, and for said automobiles and hacks, and in so doing has taken and expended the public funds in its treasury which had been raised by taxation and partly from taxpaying voters who opposed said bond issue.

Complainant further charges that voters were allowed to register up to the date of the said election and to cast their ballots in said election, and in this way a great many voters who had not been registered four months prior to the said election as required by law and who were for that reason disqualified to vote, were permitted and allowed to vote therein and did as a matter of fact cast their ballots in favor of said bond issue.

Complainant now charges that practically all of
 81 the ballots cast in said election in favor of the issuance of said bonds were illegal, either because the voters who cast the same were not qualified and were not legal voters or because they were induced to cast their ballots for the said bond issue by the said false and fraudulent publications and and corrupt practices set out above. That these corrupting influences reached the entire electorate and so permeated the same as to taint said election with fraud and corruption. That if the votes tainted were eliminated there would not remain a two-thirds majority of the votes cast in said election in favor of the issuance of said bonds; that the said election for the reasons given should be set aside and held for naught and the defendant be perpetually enjoined from issuing said bonds or from taking any further steps whatever to that end.

Complainant avers that he with the sanction and consent of said Water Company now again offers what the said company has heretofore offered to do, to permit the said defendant to cause said appraisalment and purchase to be made without regard to the time mentioned in said contract, so that said appraisalment and purchase can be made at once, or at any time between now and the end of said franchise in the event this offer is accepted by the said defendant.

The premises considered complainant prays that the defendant, the Mayor and Aldermen of the City of Vicksburg, be required to answer this its amended and supplemental bill of complaint (answer under oath being hereby specially waived)

and upon final hearing for a decree against the said defendant holding the said bond election void and without effect, and the said defendant without power to issue and float said bonds for the purpose of building a water works plant during the life of the Bullock franchise, and for an injunction against the said defendant restraining it from issuing bonds under the said election and from taking any further steps looking to the building of a water works plant during the life of the said Bullock franchise, and for such other, further and general relief as in equity complainant may be entitled.

J. C. BRYSON,
DENT & LANDAU,
Sol. for Complainant.

State of Mississippi,
County of Warren,
City of Vicksburg.

Personally appeared before the undersigned, a notary public in and for said city, county and State, W. A. Henson, who, being by me duly sworn on his oath, states:

That he is receiver of the Vicksburg Water Works Company, and the complainant in the above entitled cause; that the matters and things set forth and stated in the above entitled cause within his knowledge are true and correct as therein stated and such as are stated upon information and belief he verily believes to be true.

Affiant further states that the exhibits called for in his original bill which he now files as a part of the same, are a true and correct transcript of the instruments and papers of which they purport to be copies.

W. A. HENSON.

Sworn to and subscribed before me this 7th day of January, 1912.

G. W. McCABE,
Notary Public. [Seal]

83 The above and foregoing has the following indorsement thereon, to-wit: No. 119 Equity. W. A. Henson, Receiver, Mayor and Aldermen of the City of Vicksburg. Amended and Supplemental Bill of Complaint. Filed May 6th, 1912. L. B. Moseley, Clerk. J. H. Short, D. C.

84 **ANSWER TO AMENDED AND SUPPLEMENTAL BILL.**

In the District Court of the United States for the Western Division of the Southern District of the State of Mississippi.

W. A. Henson, Receiver,

vs.

No. 119 Equity

The Mayor and Aldermen of the City of Vicksburg.

The defendant, the Mayor and Aldermen of the City of Vicksburg, saving and reserving unto itself all manner of benefit and advantage which can or may be had or taken to the amendment to the original bill herein filed, by reason of the many errors, imperfections and uncertainties therein contained, and answering unto only so much and to such parts thereof as it is advised that it is material and necessary to make answer unto, answering, saith:

Defendant shows that said amended and supplemental bill is in great part a re-statement of the matters and things set forth in complainant's original bill of complaint, to which it has heretofore made a full and complete answer, and it does not feel called upon to again repeat the denials and allegations of said answer, because complainant has seen fit to restate the matters and things contained in his original bill in different language.

Defendant asks that the denials, charges and allegations in its answer to the original bill, aforesaid, may be taken and considered in connection with said amended and supplemental bill, in so far as they may be applicable thereto.

Defendant shows that in its answer to the said original bill of complaint, it fully answered all of the allegations therein as to the granting of the franchise to the Vicksburg Water Works Company, the meaning and effect thereof, and as to the litigation between it and said company, which

85 finally resulted in the decree of the Supreme Court of the United States referred to, and defendant shows that its said answer in this particular, is fully applicable to the matters and things alleged in the amended and supplemental bill, connected with said franchise and said litigation, and asks that they be considered in reference thereto.

Defendant again denies that by reason of anything contained in said franchise, it is prohibited from constructing a water works system of its own, to be operated after the expiration of said franchise, and again denies that this Court, in its final decree and the Supreme Court of the United States in its opinion affirming the same, ever held that such was the case.

Defendant avers that such portion of the amended and supplemental bill of complaint as purports to narrate various dealings and negotiations had between it and the Vicksburg Water Works Company, looking to the purchase of its water works system, has no conceivable bearing upon the issues raised in this proceeding.

Defendant shows that in every litigation of any kind whatsoever which has been had in this Court between it and the Vicksburg Water Works Company for several years, said company has seen fit to introduce such a pretended narrative, without any regard to its relevancy to the issues before the Court. The defendant believes, and so charges, that the purpose of the Vicksburg Water Works Company in so doing, and the purpose of its so-called receiver in again introducing this irrelevant matter, is to mislead and prejudice this Honorable Court, so that it will, through a mis-conception of the facts, or otherwise, fail to properly adjudicate the legal questions presented.

Defendant does not feel that it is under any obligations to again deny these things, having done so so many times, and contents itself with the general statement that they are wholly irrelevant and utterly false.

86 Defendant denies that the bonds proposed to be issued by it for the purpose of constructing and maintaining a water works system of its own, after the expiration of the existing franchise, are rendered invalid by reason of its failure to give notice of the intention to issue the same, as set forth in the original and supplemental bills, and denies that the curative act, being the act approved March 4th, 1912, referred to in said original and supplemental bill, is void or defective, for the reasons set out in said original and supplemental bill, or for any other reason, and defendant shows the fact to be that the Supreme Court of Mississippi, in the cause therein pending, entitled "Richard Griffith vs. The Mayor and Aldermen of the City of Vicksburg, expressly held that the said curative act was a valid exercise of legislative power, and

that its effect was to cure the failure of defendant to give notice of its intention to issue said bonds, as aforesaid.

Defendant shows that said decision of the Supreme Court of Mississippi, construing the statutes of said State, is binding upon this Honorable Court, and that the questions therein adjudicated and determined are no longer open to be litigated in this Court.

Defendant denies that it was without legal authority to issue said bonds, by reason of any supposed invalidity of Chapter 142 of the laws of 1910, and affirms that inasmuch as its power and authority to issue bonds has been expressly adjudicated by the Supreme Court of the State of Mississippi, such power is no longer open to question in this Court.

Defendant denies that said bond election is void and should be set aside, for the further reason that it was called, held and conducted under what purported to be an ordinance amending its charter adopted November 6th, 1911, and approved by the Governor on the — day of —, 1911,
 87 and denies that said ordinance was itself void and of no effect, because it conflicted with, and was antagonistic to the provisions of Chapter 142 of the laws of 1910.

Defendant shows that in the opinion aforesaid, the Supreme Court of the State of Mississippi expressly held that inasmuch as the terms and provisions of said amendment and said act were substantially the same, it was immaterial whether it undertook to issue said bonds under said amendment, or said act.

Defendant denies that it was under obligation to act as a mere arbitrator in the election held to determine whether or not said bonds should be issued between those voters who favored the issuance of said bonds and those who opposed the same, and denies that even if it were under such obligation, the effect of its undertaking to influence the result would be to render the bonds authorized at such election void.

Defendant shows that its Aldermen and its officers had a perfect right to exercise their judgment and their duty as citizens, and to participate in said election as fully as any other citizens of the City of Vicksburg, and defendant shows that within the limitation of its charter it had the right to make any proper and legitimate expenditure of the public funds of said city in and about said election.

Defendant denies that it made any improper use of said funds, or that it endeavored to influence the voters in said election.

Defendant admits that it caused to be published at public expense a pamphlet setting out in full a description of the water works system which it proposed to build with the proceeds of said bonds, and it shows that it not only had the right to so educate and inform its voters, but that it was its duty so to do, in order that they might intelligently determine whether or not said bonds should be issued.

Defendant admits that said pamphlet undertook to compare the proposed water works system with that owned by complainant and avers that complainant has no right to invoke the jurisdiction of this Court because its system suffered by such comparison.

Defendant denies that it made any other expenditure of the public fund, except to pay the necessary expenses of holding said election.

Defendant denies that it used said funds to hire automobiles, or other vehicles to transport voters to the polls, and shows that if complainant did not know that its allegations in this particular was untrue, it could easily have informed itself by referring to the public records.

Defendant shows that said pamphlet contained the report of an able and efficient engineer as to the proposed water works system and as to its relative efficiency as compared to that owned by the Vicksburg Water Works Company.

Defendant denies that any elements of value belonging to the Vicksburg Water Works Company were eliminated, and denies that complainant is possessed of sufficient engineering skill to pass upon this question.

Defendant shows that the allegations of the amended and supplemental bills in this particular, are irrelevant, frivolous and impertinent; that it is manifest that the validity of the bonds authorized at said election cannot be affected by the alleged failure of the engineer employed by it to properly perform his duties.

Defendant denies that said bonds are rendered invalid because said pamphlet contained a letter from the Mayor of Helena, Montana, to one of its Aldermen, and denies that it ever caused to be published in any newspaper published in

Vicksburg, or elsewhere, the articles referred to in the amended and supplemental bill.

Defendant shows that the overwhelming sentiment of its citizens was always in favor of the construction by it of a water works system of its own, and that this was proven by the fact that at said election, 1091 votes were cast in favor of issuing the proposed bond, and only 167 votes were cast against said bond issue.

Defendant shows that in the opinion delivered in the Supreme Court of the State of Mississippi, as aforesaid, it was expressly held that the fact that certain voters were permitted to vote who had registered within four months prior to said election, in no wise effected the validity of said bond issue.

Defendant denies that it made any false or fraudulent representations to its voters or was guilty of any corrupt practices, and avers that complainant well knows its allegations in this connection to be untrue.

Defendant denies that practically all of the ballots cast in said election in favor of the issuance of said bonds were illegal, and denies that complainant's allegation in this particular is entitled to any consideration whatsoever, inasmuch as the question of the legality of said ballots cannot be determined by this Court merely upon the vague conclusion thus stated, without any specification as to what caused such invalidity.

And now having duly answered, defendant prays that it may be permitted to go hence without day, together with its costs in this behalf expended.

MAYOR & ALDERMEN OF THE CITY
OF VICKSBURG,
By GEORGE ANDERSON,
BRUNINI & HIRSCH,
CATCHINGS & CATCHINGS,

Solicitors.

The above and foregoing has the following indorsement thereon, to-wit: 119 Eq. W. A. Henson, Receiver, vs. Mayor and Aldermen of the City of Vicksburg. Answer to Amended and Supplemental Bill. Filed July 1, 1912. L. B. Moseley, Clerk. J. H. Short, D. C.

REPLICATION.

In the District Court of the United States in and for the
Western Division of the Southern District of Mississippi.

W. A. Henson, Receiver,

vs.

No. 119 Equity

Mayor and Aldermen of the City of Vicksburg.

This repliant saving and reserving to itself any and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answers of said defendant to the original and amended and supplemental bills, for replication thereunto, saith that it doth and will aver, maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by the said defendant, and that the answer of said defendant is uncertain, evasive and insufficient in law to be replied unto by this repliant; without that, that any other matter or thing in the said answer contained, material or effectual in law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denies, is true; all matters and things this repliant is ready to aver, maintain and prove as this Honorable Court shall direct, and humbly pray as in its bill it hath already prayed.

J. C. BRYSON &

HIRSCH, DENT AND LANDAU,

Sols. for Complainant.

The above and foregoing has the following indorsement thereon, to-wit: =119 Equity. In District Court, United States, Western Div. So. District of Miss. W. A. Henson, Receiver, vs. Mayor & Aldermen of the City of Vicksburg. Replication. Filed and ent'd. August 13, 1912. L. B. Moseley, Clerk. J. H. Short, D. C.

SUPPLEMENTAL BILL.

Filed December 27, 1912.

In the District Court of the United States in and for the
Western Division of the Southern District of Mississippi.

W. A. Henson, Receiver,

vs.

No. 119 Equity

Mayor and Aldermen of the City of Vicksburg.

To the Honorable H. C. Niles, Judge of said Court:

W. A. Henson, receiver, complainant, by leave of court first had, files this his supplemental bill of complaint against the defendant and the Mayor and Aldermen of the City of Vicksburg, and in addition to the matters and things set forth and pleaded by him in his original and amended and supplemental bills heretofore filed in this cause, now avers:

Your orator reiterates each and every of the allegations of his original and amended and supplemental bills and now further by this supplemental bill complains and says that since the filing of his amended and supplemental bill herein the said defendant the Mayor and Aldermen of the City of Vicksburg in violation of said final decree rendered by the Supreme Court of the United States affirming the decree of this court in Equity Cause No. 41, and with the evident purpose to commence the construction of a water works system of its own and without waiting for the trial of this cause upon its merits, on December 17th, 1912, in violation of the said injunction of the said Supreme Court of the United States in said suit No. 41, and of the terms of the Bullock franchise referred to in complainant's said amended and supplemental bill upon which said decree was based, did resolve and decide to lay water mains on Crawford, Veto and Monroe Streets in the said defendant city, and to that end by resolution duly entered on its minutes directed the Mayor to advertise for bids for the construction of water mains on said Crawford, Veto and Monroe Streets, and the said Mayor has accordingly advertised for bids for the laying of said mains, the said bids to be received and opened on January 6th, 1913, the said advertisement being in words and figures as follows, to-wit:

"Notice to Contractors."

"Sealed bids will be received at the office of the City Clerk of the City of Vicksburg up to 8 o'clock P. M. Monday, January 6, 1913, for the laying of water mains on Crawford, Veto and Monroe Streets, also laying of storm sewers on Crawford Street. Plans and specifications on file in the office of the City Engineer. The Mayor and Aldermen reserve the right to reject any and all bids.

"J. J. HAYES, Mayor."

Your orator further shows that in pursuance to said notice, bids will be received and opened on Monday, January 6th, 1913, and unless restrained by this Honorable Court the said defendant will on said day, if any of said bids prove acceptable, enter into a contract with the successful bidder for the laying of said mains on said streets before the present cause can be submitted and heard, and that irreparable injury will accrue to your orator therefrom.

The premises considered, your orator prays that the defendant be required to answer, oath being expressly waived, and that a temporary restraining order be issued prohibiting the said defendant from carrying into effect said resolution and from receiving or accepting any of said bids, and from entering into any contract pursuant thereto, or undertaking in any manner to violate the said decree of the Supreme Court of the United States affirming the decree of this Court herein before mentioned by taking any steps for the construction of a water works system of its own during the life of the said Bullock franchise referred to in complainant's said amended and supplemental bill herein, and to that end that a preliminary injunction issue and upon hearing the said preliminary injunction be perpetuated by a final injunction, or for such other, further and general relief as may appear meet and proper in the premises.

And as in duty bound your orator will ever pray, etc.

W. A. HENSON, Receiver.

By GREEN & GREEN, Solicitors.

J. C. BRYSON.

DENT & LANDAU,

GREEN & GREEN, Sol. for Complainant.

State of Mississippi,
County of Warren,
City of Vicksburg.

Personally appeared before me the undersigned authority in and for the above named city, county and State, S. R. Kemper, agent of W. A. Henson, Receiver, complainant in the above entitled cause, and after being by me first duly sworn, on oath says, that he is authorized to make this affidavit, and of his own knowledge states that the matters and things set forth and pleaded in the foregoing supplemental bill are true and correct as stated.

S. R. KEMPER.

Sworn to and subscribed before me this 26th day of December, 1912.

G. W. McCABE,
Notary Public. [Seal]

The above and foregoing has the following indorsement thereon, to-wit: No. 119 Equity, U. S. Dist. Court Western Division of So. Dist. Miss. W. A. Henson, Receiver, vs. The Mayor and Aldermen of the City of Vicksburg. Supplemental Bill. Filed Dec. 27, 1912. L. B. Moseley, Clerk.

96

RESTRAINING ORDER.

In the District Court of the United States for the Western Division of the Southern District of Mississippi.

W. A. Henson, Receiver,

vs.

No. 119 Equity

Mayor and Aldermen of the City of Mississippi.

This day came on to be heard the application of the complainant herein on the supplemental bill filed herein for a restraining order as prayed therein, and the Court being satisfied in the premises, it is ordered, adjudged and decreed that defendants, Mayor and Aldermen of the City of Vicksburg, their agents and attorneys, be and the same are hereby restrained from carrying into effect the resolution of the Mayor

and Board of Aldermen advertising for sealed bids for the laying of the water mains on Crawford, Veto and Monroe Streets in the City of Vicksburg, and from receiving and accepting any bids thereon and from entering into contract pursuant thereto, or undertaking in any manner to violate the decree of the Supreme Court of the United States affirming the decree of this Court in equity cause No. 41 on the docket of this Court, by taking any steps for the construction of a water works system of its own during the life of the Bullock franchise referred to in complainant's amended and supplemental bill herein, until the further order of the Court or Judge herein, and that the application for a preliminary injunction prayed be and the same is hereby set for hearing at the Courthouse in Vicksburg, Mississippi, at 10 o'clock A. M. on January 10th, 1913, and that this restraining order be made effective upon complainant's entering into bond conditioned according to law in the penal sum of \$500.00 with surety or sureties to be approved by the Clerk of said Court. Ordered, adjudged and decreed at chambers this 27th day of December, A. D. 1912.

H. C. NILES, Judge.

97 The above and foregoing has the following indorsement thereon, to-wit: No. 119. In the District Court of the United States, Western Southern District Mississippi. W. A. Henson, Receiver, Mayor and Aldermen of the City of Vicksburg. Restraining Order. Filed and ent'd. Dec. 30, 1912. L. B. Moseley, Clerk. J. H. Short, D. C.

98

RESTRAINING ORDER.

In the District Court of the United States in and for the
Western Division of the Southern District of Mississippi.

W. A. Henson, Receiver,

vs.

No. 119 Equity

Mayor and Aldermen of the City of Vicksburg—

To the Mayor and Aldermen of the City of Vicksburg, and
its Agents, Attorneys and Employees—
Greetings:

Whereas a supplemental bill of complaint has lately been exhibited in the District Court of the United States in and for the Western Division of the Southern District of Mississippi by W. A. Henson, receiver in the above entitled cause, in which he prays to be relieved touching the matters in said supplemental bill contained, and especially for an injunction directing and restraining you and each of you as hereinafter set out, and whereas the Honorable H. C. Niles, Judge of said Court entered his fiat upon said supplemental bill granting said injunction and bond, and security having been given as required by the said fiat, we therefore strictly enjoin and command you and each of you under penalty of contempt of court from carrying into effect the resolution of your Honorable Body advertising for bids for the laying of water mains on Crawford, Veto and Monroe Streets in said City of Vicksburg, and from receiving and accepting any bids thereon and from entering into contract pursuant thereto or undertaking in any manner to violate the decree of the Supreme Court of the United States affirming the decree of this court in equity cause No. 41 on the docket of this court by taking any steps for the construction of a water works system during the life of the Bullock franchise referred to in the pleadings in
the above entitled cause until further order of this
court of Judge herein.

Witness the Hon. H. C. Niles, Judge of the District Court of the United States for the State of Mississippi, and the seal of said District at Vicksburg, Mississippi, this 30th day of December, 1912.

L. B. MOSELEY, Clerk.

By J. H. SHORT, D. C.

[Seal]

To the United States Marshal for the Southern District for service.

L. B. MOSELEY, Clerk.
J. H. SHORT, D. C. [Seal]

MARSHAL'S RETURN.

Received this writ at Vicksburg, Miss., on Dec. 30, 1912, and executed same on the same day at Vicksburg, Miss., upon the Mayor and Aldermen of the City of Vicksburg by handing a true copy of this original writ to Mr. J. J. Hays, Mayor of the City of Vicksburg.

W. O. LIGON,

U. S. Marshal.

By C. R. LIGON, Deputy.

Marshals fees	\$2.00
Mileage	2.64
	<hr/>
	\$4.64

The above and foregoing has the following indorsement thereon, to-wit: \pm 119 Equity. In District Court, W. A. Henson, Receiver, Mayor and Aldermen of the City of Vicksburg. Restraining Order. Filed & ent'd, Jan. 1, 1913. L. B. Moseley, Clerk. J. H. Short, D. C.

100 In the District Court of the United States, for the Western Division of the Southern District of Mississippi.

W. A. Henson, Receiver,

vs.

No. 119 Equity

The Mayor and Aldermen of the City of Vicksburg.

The answer of the Mayor and Aldermen of the City of Vicksburg to the supplemental bill of complaint herein filed against it, respectfully shows that it admits that since the filing of the amended and supplemental bill heretofore filed herein, it, with the purpose to commence the construction of

a water works system of its own, on December 17th, 1912, did resolve and decide to lay water mains on Crawford, Veto and Monroe Streets in the City of Vicksburg, and to that end a resolution duly entered on its minutes directed its Mayor to advertise for bids for the construction of water mains on said streets, and that said Mayor has accordingly advertised for bids for laying of said mains, said bids to be received and opened on January 6th, 1913, the said advertisements being in words and figures as set out in said supplemental bill of complaint.

Defendant admits that prior to the filing of said supplemental bill of complaint, it was its purpose to receive and open such bids as might be received in pursuance of said advertisement on Monday, January 6th, 1913, and if any of said bids should prove acceptable to enter into a contract with the successful bidder for the laying of said mains on said streets at once.

Defendant denies, however, that in determining to lay said mains and in advertising for bids for doing said work, it has violated, or would in laying said mains in any way violate the decree of this court in Equity case No. 41, or the decree

of the Supreme Court of the United States in said
 101 case. And defendant avers that it has the right to lay said mains, inasmuch as it is its purpose, as it has heretofore repeatedly announced, not to use them for the purpose of supplying water to itself to [or] its citizens until the expiration of the franchise now held by the Vicksburg Water Works Company. And defendant denies that said franchise would be in any way violated or affected by the laying of said mains.

Defendant reaffirms and repeats all of the allegations contained in its answer to the original and supplemental bills of complaint in so far as they may be applicable to the allegations of the supplemental bill of complaint recently filed against it as aforesaid.

Defendant denies that in deciding to lay said mains and in laying them, complainant would be irreparably injured, or would be injured at all, and denies that he, or the Vicksburg Water Works Company is entitled to an injunction restraining defendant from so doing, and denies that he, or said company, is entitled to any relief whatsoever in the premises.

And now having fully answered, defendant prays that the

original and supplemental bills of complaint filed against it in this case may be dismissed, and that it may go hence without day, together with its costs in this behalf expended.

**MAYOR AND ALDERMEN OF THE
CITY OF VICKSBURG.**

By **GEORGE ANDERSON,**
JOHN BRUNINI,
O. W. CATCHINGS, Solicitors.

The above and foregoing has the following indorsement thereon, to-wit: 119 Equity. W. A. Henson, Receiver, vs. The Mayor and Aldermen of the City of Vicksburg.
102 Answer of Defendant to Supplemental Bill of Complaint. Filed and ent'd Jan. 2, 1913. L. B. Moseley, Clerk. J. H. Short, D. C.

103

REPLICATION.

In the District Court of the United States in and for the Western Division of the Southern District of Mississippi.

W. A. Henson, Receiver,
vs. No. 119. Equity.
Mayor and Aldermen of the City of Vicksburg.

This repliant, saving and reserving to itself any and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer to the supplemental bill filed Dec. 27, 1912, of said defendant, for replication thereunto saith that it doth and will aver, maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by the said defendant, and that the answer of said defendant is uncertain, evasive and insufficient in law to be replied unto by this repliant; without that, that any other matter or thing in the said answer contained, material or effectual in law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denies [denied], is true; all matters and things this repliant is ready to aver, maintain and

prove as this Honorable Court shall direct and humbly pray as in its bill it hath already prayed.

J. C. BRYSON and
HIRSH, DENT & LANDAU,
Sols. for Complainant.

Filed by agreement as of January tenth, 1913, on February 22, 1913.

L. B. MOSELEY, Clerk.
J. H. SHORT, D. C.

104 PETITION OF LELIA BOYKIN TO BE MADE A
PARTY COMPLAINANT.

In the District Court of the United States in and for the
Western Division of the Southern District of Mississippi.

W. A. Henson, Receiver,

vs.

No. 119. Equity.

Mayor and Aldermen of the City of Vicksburg.

Now comes Lela Boykin and petitions this Honorable Court to be allowed to intervene herein and to be made a party complainant the same as if she had joined in the original bill of complaint and to that end shows:

That she is a citizen and resident of the Town of Waycross, in the State of Georgia, and is a non-resident of the State of Mississippi.

That she is the owner of a certain lot or parcel of land situate and being in the City of Vicksburg, Mississippi, particularly described as follows: Lot 9, Square 37, of the Wharf and Land Company's resurvey in said city; that said lot is assessed for taxation by the said city and petitioner has heretofore paid taxes thereon by the said city so long as she remains the owner thereof.

That by reason of these petitioner is advised that she is a taxpayer in said defendant city and is entitled to all the rights, privileges and benefits accruing to such by operation of law.

That should the bonds authorized by said bond election complained of in the original bill herein be issued petitioner's

property will be taxed the same as other properties generally throughout the said city to pay interest upon the said bonds and the principal thereof at maturity, and petitioner will thereby be required to pay her proportionate part of the said interest and principal of said bonds, the same as the taxpayers generally.

105 That the facts stated in the original bill of complaint filed herein and in the amended and supplemental bill of complaint herein, apply to petitioner the same as to complainant, except so much and such parts of said bills as set up and plead a former adjudication in favor of the Vicksburg Water Works Company; wherefore, petitioner adopts as her own all the averments of said bills except so much and such parts thereof as set up and plead said former adjudication the same as if she had fully set out the said averments herein.

Petitioner further avers that she has obtained the consent of the original complainant, W. A. Henson, receiver, to file this petition and to be admitted as a party complainant herein.

The premises considered, complainant prays for an order of this Honorable Court admitting her as a party complainant herein and to that end that summons issue to the Mayor and Aldermen of the City of Vicksburg, defendant herein, requiring the said defendant to appear and answer this petition and upon final hearing petitioner joins in the original complainant's prayer for relief, and for such other, further and general relief as petitioner may be entitled.

And as in duty bound petitioner will ever pray.

LELA BOYKIN,

By J. C. BRYSON, Sol.

HIRSCH, DENT & LANDAU,

Sols. for Petitioner.

The above and foregoing has the following indorsement thereon, to-wit: 119 Eq. W. A. Henson, Recv., Mayor and Aldermen of the City of Vicksburg. Petition of Lela Boykin To Be Allowed To Be Joined as Complainant. Filed and ent'd July 1, 1912. L. B. Moseley, Clerk. J. H. Short, D. C.

106 In the District Court of the United States, Western
Division of the Southern District of Mississippi.

W. A. Henson, Receiver,
vs. No. 119. Equity.
Mayor and Aldermen of the City of Vicksburg.

Now comes W. A. Henson, receiver, and for answer to the petition of Lela Boykin says:

That he admits the averments in the petition of the said Lela Boykin and adopts the same and consents that she may be admitted as a party complainant herein as prayed for in her said petition.

J. C. BRYSON,
HIRSCH, DENT & LANDAU,
GREEN & GREEN.

For Petitioner.

The above and foregoing has the following indorsement thereon, to-wit: No. 119 Equity. W. A. Henson, Receiver, vs. Mayor & Aldermen. Answer of W. A. Henson, Rec. Filed and ent'd Jan. 10, 1913. L. B. Moseley, Clerk. J. H. Short, D. C.

107 ANSWER OF DEFENDANT TO PETITION OF
LEILA BOYKIN TO BE MADE A PARTY
COMPLAINANT.

In the District Court of the United States for the Western
Division of the Southern District of Mississippi.

W. A. Henson, Receiver,
vs.
Mayor and Aldermen of the City of Vicksburg.

The answer of the Mayor and Aldermen of the City of Vicksburg, defendant, to the petition of intervention of Lela Boykin, respectfully shows that it has no information as to any of the allegations of said petition as to petitioner's interest or concern in this cause, and is wholly indifferent as to whether or not she shall be admitted as a party complainant hereto.

Defendant shows, however, that if she shall be so admitted all of the denials and allegations contained in its answers to the original and supplemental bills heretofore filed herein are applicable to her as well as to W. A. Henson, receiver, insofar as he sues as a taxpayer of the City of Vicksburg, and defendant prays that the said denials and allegations may be taken and treated as specifically made in reference to petitioner as fully and to the same extent as if herein set out in full.

And now having fully answered, the defendant prays that it may go hence without day, together with its costs in this behalf expended.

MAYOR & ALDERMEN OF THE CITY
OF VICKSBURG,
By GEORGE ANDERSON,
JOHN BRUNINI,
O. W. CATCHINGS,
Solicitors for Defendant.

108 By consent of counsel the above answer shall be filed as of January 10, 1913.

J. C. BRYSON,
HIRSCH, DENT & LANDAU,
GREEN & GREEN,
Solicitors for Complainant.
GEORGE ANDERSON,
JOHN BRUNINI,
O. W. CATCHINGS,
Solicitors for Defendant.

The above and foregoing has the following indorsement thereon, to-wit: #119 Equity. W. A. Henson, Receiver, vs. Mayor & Aldermen of the City of Vicksburg. Answer of Defendant to Petition of Lela Boykin. Filed February 13th, 1913, as of January 10th, 1913. L. B. Moseley, Clerk. J. H. Short, D. C.

109

W. A. Henson, Receiver,
vs. No. 119. Equity.
Mayor & Aldermen of the City of Vicksburg.

The above style cause coming on this day for hearing on the petition of Lela Boykin to be admitted as a party complainant in said cause and the answer of W. A. Henson, receiver, complainant in said cause, thereto, and the Court having read and considered the said petition and the said answer, it is ordered and decreed that the said Lela Boykin he [be] and she is hereby admitted as a party complainant in said cause as prayed for in her said petition.

Ordered and decreed this 10th day of January, 1913.

H. C. NILES, Judge.

The above and foregoing has the following indorsement thereon, to-wit: No. 119 Equity. W. A. Henson, Receiver, vs. Mayor & Aldermen. Decree Admitting Lela Boykin as a Party Complainant. Filed and ent'd Jan. 10, 1913. L. B. Moseley, Clerk. J. H. Short, D. C.

110 AN AMENDMENT IN REGARD TO MUNICIPAL BONDS.

An Ordinance to Amend an Ordinance Entitled An Ordinance to Amend the Charter of the City of Vicksburg, Mississippi, Ordained November 3rd, 1902, and Approved November 4th, 1902.

Be it ordained by the Mayor and Aldermen of the City of Vicksburg, Mississippi, that the amendment to the charter of said City of Vicksburg, ordained November 3rd, 1902, and approved November 4th, 1902, be and the same is hereby so amended as to read as follows:

1. Municipal Bonds: The Mayor and Aldermen, for the purpose of raising money for the erection of municipal and school buildings and the purchase of such buildings or land therefor and the improvements and adornment thereof, for the erection or purchase of water works, gas, electric and other

plants, the establishment of a sewerage system, the protection of the municipality from overflow, improving or paving streets, or for the liquidation of existing debts of the municipality, may issue the bonds or other obligations of the city not to exceed in amount, including all outstanding bonds, seven per centum of the assessed value of the taxable property of the municipality, unless authorized by two-thirds of the qualified electors thereof; but in no case shall the amount issued exceed ten per centum of the assessed value. But the limit on the amount shall not apply to bonds or other obligations issued or liquidation or to raise funds to liquidate any indebtedness existing when this amendment becomes operative.

2. The Same; Details of, etc.: Said bonds shall mature not later than twenty years from the date of their issuance, and bear interest at a rate not exceeding seven per centum per annum, payable annually or semi-annually, as the board shall elect; and such bonds, or any part thereof, shall be payable after five years at the option of the municipality. All such bonds shall be printed or lithographed with suitable devices to prevent counterfeiting, shall be in sums of one hundred dollars or five hundred dollars each, and shall be registered as issued, be numbered in a regular series from one upward, be signed by the Mayor and countersigned by the clerk, who shall impress the municipal seal upon each bond as it is issued, and every such bond shall specify on its face the purpose for which it was issued, and the total amount authorized to be issued, and each shall be made payable to a person by name, the purchaser, followed by the words "or bearer."

3. The Same; What Is To Be Done Before Issuing Bonds: Before providing for the issuance of any bonds, the Mayor and Aldermen shall publish notice of the proposal to issue the same in a newspaper published in the municipality, for three weeks next preceeding; and if, within that time, twenty per centum of the adult taxpayers of the municipality shall petition against the issuance of the bonds, then the bonds shall not be issued, unless authorized by a majority of the electors voting in an election to be ordered for that purpose. All the expense of preparing the bonds, publishing notices and holding such election shall be paid out of the municipal treasury.

4. Bonds May Be Made to Mature Annually, etc.: The Mayor and Aldermen, if it elect, may issue bonds, making a part of them mature annually, and running through a series of not more than twenty years from their issuance. All the interest in such cases and a part of the principal, to be fixed by the Mayor and Aldermen at the time the bonds are issued, shall be payable annually, and the bonds shall be issued accordingly; in which case a part of the principal shall not be called in and paid by the Mayor and Aldermen until maturity of the bonds.

5. Be it further ordained, that all acts and parts of acts and all ordinances and parts of ordinances in conflict with this ordinance, be, and the same are hereby, repealed, and that this ordinance take effect and be in force from and after its approval by the Governor and its record in the office
112 of the Secretary of the State.

Ordained this 1st day of May, 1905.

H. J. TROWBRIDGE,

City Clerk.

Approved this 2nd day of May, 1905.

B. W. GRIFFITH, Mayor.

O. B. p. 441.

Filed as of January 10th, 1913. L. B. Moseley, Clerk.
J. H. Short, D. C.

113 AMENDMENT TO THE CHARTER OF THE
CITY OF VICKSBURG, NOVEMBER 6,
1911.

At Ordinance to Amend Section 1 of an Ordinance Ordained May 1st, 1905, and Approved May 2, 1905, Amending the Charter of the City of Vicksburg as Amended by an Ordinance Approved November 4, 1902, Regarding Municipal Bonds.

Be it ordained by the Mayor & Aldermen of the City of Vicksburg that Section 1 of an ordinance ordained May 1st, 1905, and approved May 2nd, 1905, amending the charter of the City of Vicksburg as amended by an ordinance approved

November 4, 1902, regarding municipal bonds, be so amended as to read as follows:

Section 1. **Municipal Bonds:** The Mayor & Aldermen of the City of Vicksburg, for the purpose of raising money for the erection of municipal and school buildings and the purchase of such buildings or land therefor and the improvement and adornment thereof, for the erection or purchase of water works, gas, electric and other plants, the establishment of a sewerage system, the protection of the municipality from overflow, improving or paving streets, or for the liquidation of existing debts of the municipality, may issue the bonds or other obligations of the city not to exceed in amount, including all outstanding bonds, seven per centum of the assessed value of the taxable property of the municipality, unless authorized by two-thirds of the qualified electors thereof, voting at an election held for that purpose; but in no case, except as hereinafter provided shall the amount issued exceed ten per centum of the assessed value. Provided that the amount that may be issued for the purpose of improving or paving streets or sidewalks or constructing or otherwise acquiring water works, gas or electric plants, may exceed ten per centum, but in no case to exceed fifteen per centum of the assessed value, which shall be submitted to an election as above. But the limit on the amount shall not apply to bonds or other obligations issued in liquidation or to raise funds to liquidate any indebtedness existing when this amendment becomes
 114 operative. This ordinance shall not effect or repeal any part of Article 25 of Section 28 of said charter.

Whenever bonds shall be issued for the construction or purchase of water works, gas or electric plants, the Mayor and Aldermen of the City of Vicksburg may provide by ordinance, resolution, contract or otherwise, that the said bonds shall be secured by pledge of the revenues of the said water works, gas or electric lighting plants to be constructed or purchased with the proceeds thereof.

Section 2. That this ordinance take effect and be in force from and after its approval by the Governor of the State of Mississippi.

Ordained this 6th day of November, 1911.

A. M. PANTON,
 City Clerk.

Approved this 8th day of November, 1911.

J. J. HAYES, Mayor.

Approved by the Governor of Mississippi, December 11th, 1911.

Filed as of January 10th, 1913.

L. B. MOSELEY, Clerk.

J. H. SHORT, D. C.

115 CERTIFIED COPY OF RESOLUTION OF DEFENDANT OF DECEMBER 17th, 1912.

City Hall,

Vicksburg, Miss.,

December 17th, 1912.

On motion of Alderman Stein, the Mayor was authorized to advertise for the paving or [of] Monroe and Veto Streets, as called for on the petition on file.

On motion of Alderman Harding, the Mayor was authorized to advertise for the paving of Crawford Street, as called for in the petition of a majority of the property owners of said street.

On motion of Alderman Stein, the Mayor was authorized to advertise for bids for the laying of water mains on Crawford, Veto and Monroe Streets, and the laying of storm sewers on Crawford Street.

I, A. M. Paxton, city clerk of the City of Vicksburg, State of Mississippi, do certify that the foregoing are true and correct transcripts from the minutes of the Mayor & Aldermen of the City of Vicksburg as shown by the minute book of the aforesaid, recorded at page 103 of Minute Book K.

[City Seal, Vicksburg, Miss.]

A. M. PAXTON.

The above and foregoing has the following indorsement thereon, to-wit: No. 119 Equity. W. A. Henson, Rec., vs. Mayor & Aldermen of Vicksburg. Certified Copy of Resolutions to Lay Water Mains on Veto, Crawford and Monroe Streets. Filed Jan. 10, 1913. L. B. Moseley, Clerk. J. H. Short, D. C.

EXHIBIT.

Copy of Franchise to Samuel R. Bullock & Company.

Water Works Ordinance.

Exhibit "A."

An ordinance to provide for a supply of water to the City of Vicksburg, in Warren County, Mississippi, and to its inhabitants contracting with Samuel R. Bullock and Company, their associates, successors and assigns, for a supply of water, for public use; and giving the said City of Vicksburg an option to purchase the said works.

Be it ordained the Mayor and Aldermen of the City of Vicksburg.

Sec. 1. That in consideration of the public benefit to be derived therefrom, the exclusive right and privilege is hereby granted for the period of thirty (30) years from the time this ordinance takes effect unto Samuel R. Bullock and Company, their associates, successors and assigns, of erecting, maintaining and operating a system of water works in accordance with the terms and provisions of this ordinance and of the streets, alleys, public squares, and other public places within the corporate limits of the City of Vicksburg, Mississippi, as they now exist, or may hereafter be extended and within such other territory, as may now or hereafter be extended and within such other territory, as may now or hereafter be under its jurisdiction, for the purpose of laying pipes, mains and other conduits and erecting hydrants and other apparatus for conducting and furnishing an adequate supply of good wholesome water to the City of Vicksburg, Mississippi, and to its inhabitants, for public and private use and for making repairs, and extensions to the said system from time to time during the period in which this ordinance shall be in force. The said Samuel R. Bullock & Company, their associates, successors and assigns, shall exercise the greatest care and diligence in the use of said streets, alleys and public squares, and other public places, and shall cause no unnecessary obstructions of an interruption to the public travel over or upon the same, or any injury

to or interference with any pipes, mains, or sewers which may now be lawfully located beneath the surface thereof.

117 The said Samuel R. Bullock and Company, their associates, successors and assigns, shall take every precaution against danger to property, life and limb by reason of the exercise of the rights and privilege hereby granted, and shall cause all excavations and obstructions to be properly lighted and guarded at night, and after the completion of the purposes for which the said streets, alleys, public squares, and other public places may be used, they shall be restored to their former condition, as near as may be without unnecessary delay, and they shall at their own cost and expense relay their mains and pipes when made necessary by a change of grade in any street ordered by the Board of Mayor and Aldermen of said city, if there was no established grade for such street at the time said mains and pipes were laid. On failure to restore said streets, alleys, public squares and other public places, as aforesaid, the Mayor and Aldermen of the City of Vicksburg, may, on reasonable notice to them by any city officer, cause the same to be restored, and recover the costs and expense thereof from the said Samuel R. Bullock & Co., their associates, successors and assigns in any court having jurisdiction of the amount.

The said Samuel R. Bullock and Company, their associates, successors and assigns hereby agree to hold the Mayor and Aldermen of the City of Vicksburg from any liability which may result to it by reason of any violation of this section.

Sec. 2. The general plan of said system of water works shall be as follows:

Mains: The pipe system shall consist of not less than (12) miles of mains of sizes varying from sixteen (16) inches to six (6) inches in diameter. The pipes used shall be of the best quality of cast iron pipe, and each pipe shall be tested at its place of manufacture to a pressure of three hundred (300) pounds to the square inch. All pipes shall be coated with Dr. Angus Smith preservative varnish and shall be laid and jointed by competent mechanics and in the best possible manner. The streets along which and at what point said mains shall be laid shall be first desig-

nated by the Board of Mayor and Aldermen of the City of Vicksburg.

Hydrants: The hydrants shall be double nozzle fire hndrants [hydrants] with nozzle fitted to connect with the hose couplings now in use by the fire department of said City of Vicksburg. The Board of Mayor and Aldermen of the City of Vicksburg shall within thirty (30) days from the date of the final passage of this ordinance designate the points on the line of the distributing mains at which the hydrants shall be erected.

Gates and Valves: All necessary gates and valves shall be provided and located at such points on the lines of the mains as will enable certain districts to be cut off and isolated when repairs are needed without depriving other districts of their full supply.

Pumps: The pumping plant shall consist of two pumping engines, each capable of pumping two millions (2,000,000) of gallons of water per day of twenty-four hours against the pressure needed to supply all parts of the pipe system with an abundant supply of water. They shall be so arranged as to be operated separately or together.

Boilers: The Boilers shall be of amply [ample] capacity to operate the pumping engines, and shall be so arranged as to be operated separately or together as may be required.

Stand Pipes: There shall be a stand pipe or reservoir, of sufficient capacity and height or elevation, to furnish an ample supply of water for consumption at the highest points along the lines of the mains.

Pump House: The pump and boiler house shall be a substantial stone or brick building, of ample size for the pumps and batteries of boilers. The smoke stack will be of brick of the size needed to operate the boiler.

Source of Supply: The water shall be taken from such point as may be free from all sewerage contamination and shall and shall be good wholesome water, fit for any purpose of domestic or manufacturing consumption.

Sec. 3. In consideration of the public benefit and the protection to property resulting from the construction of the said system of water works, the Mayor and Aldermen of the City of Vicksburg hereby rents of the said Samuel R. Bullock and Company, their associates, successors and assigns, not less than eighty (80) double nozzle frost proof fire hydrants for the aforesaid period of thirty (30) years, at the annual rental of sixty-five (65.00) dollars for each hydrant, to be payable semi-annually of [on] the fifteenth day of January and July. After the first year of the operation of said water works the said city hereby rents not less ten (10) hydrants in addition to said eighty (80) for the unexpired period of said thirty (30) years; the first one hundred (100) hydrants shall be located on the original twelve (12) miles of mains at said annual rental of sixty-five (65) dollars payable as aforesaid and for the remainder of said period thirty (30) years unexpired at the time of placing each of said hydrants. The rental of all hydrants in excess of said one hundred hydrants hereafter erected on the line of distributing mains or on the extensions thereof as hereinafter provided at the request of the said Mayor and Aldermen of the City of Vicksburg shall be at the annual rate of fifty (\$50) dollars for each hydrant, payable as aforesaid during the unexpired period of the said original term of thirty (30) years. Water shall be used from the said hydrants for the extinguishment of fires and necessary fire practices, and for flushing sewers and gutters only, provided that for fire practice and flushing sewers no more than two hydrants shall be opened at one time, and not more than once in each week.

Sec. 4. Water shall be furnished free of charge to the public schools and other public buildings used exclusively for city purposes and for filling public cisterns, and the City Hospital shall also be supplied with water free by a supply pipe whenever the mains shall be laid within seven hundred and fifty (750) feet of said hospital. And water shall also be supplied free for six drinking fountains with openings for man and beast, and one public fountain to be erected by the said Samuel R. Bullock & Company in such place on the line of mains as the Board of Mayor and Aldermen of the City of Vicksburg may direct.

Sec. 5. The said Samuel R. Bullock & Company, their as-

sociates, successors and assigns, may procure the organization of a water works corporation, under the laws of any State, and may assign to it all the rights and privileges acquired thereunder, provided that such assignment shall not invalidate or effect the bond required by Section Seven (7) thereof; and no assignment hereof shall be valid unless such assignee shall in writing to said Board of Mayor and Aldermen accept this ordinance, and become bound by its terms and obligations. And the said Board of Mayor and Aldermen shall pass and enact such further and other ordinances, and may do and perform such other acts, including the repassage of this ordinance in favor of the said corporation, as may be necessary to vest in said corporation the rights and privileges hereby granted.

Sec. 6. Upon the completion of the construction of said system of water works, the said Samuel R. Bullock and Company, their associates, successors and assigns, shall notify the Mayor and Aldermen of the City of Vicksburg to that effect in writing and thereupon submit the works to such a test as will show the capacity of the works to be sufficient to throw four (4) fire streams through one hundred feet of two and one-half inch hose, and one inch nozzle from four (4) different hydrants, a stream not less than fifty (50) feet high at the highest elevation on which any of such hydrants are located. On the satisfactory performance of this test the said Board of Mayor and Aldermen shall formerly [formally] accept said system if constructed with the terms of this ordinance.

121 Sec. 7. Within fifteen days after the day that this ordinance takes effect the said Samuel R. Bullock and Company, their associates, successor and assigns, shall file their written acceptance thereof, binding themselves to its terms and obligations in the office of the city clerk, accompanied by their bond in the penal sum of ten thousand dollars (\$10,000.00) with two or more sufficient securities to be approved by the said Board of Mayor and Aldermen and executed to the Mayor & Aldermen of the City of Vicksburg and conditioned for the faithful performance of the terms this section. On failure to file such bonds within said time, this ordinance shall become null and void. But if said board shall not approve the bond so filed, said board may in its discre-

tion grant additional reasonable time within which to file another bond.

The construction of said system shall be commenced within sixty days after this ordinance takes effect, and said system shall be completed within eighteen (18) months after the commencement of the construction thereof, provided, however, that the time during which the said Samuel R. Bullock and Company, their associates, successors and assigns are delayed by floods, act of God [God] or the public enemy, legal proceedings for the maintenance or defense of their legal rights, or in the acquisition of property or right of way or by reason of any other cause whatever beyond their control, shall form no part of the time limited in this ordinance for the performance of any act required by the terms hereof to be done by them, but they shall use all due diligence to remove any such other obstruction or delays.

Sec. 8. The said Board of Mayor and Aldermen of the City of Vicksburg shall from time to time pass and enact ordinances under suitable penalties providing for the protection of the said water works from damages, fraud or imposition.

Sec. 9. At the expiration of each period of ten years after this ordinance takes effect the Mayor and Aldermen of the City of Vicksburg shall have the right and privilege to purchase the said water works, provided they notify the said Samuel R. Bullock and Company, their associates, successors or assigns of their intention so to do, at least one year before the expiration of the said period of ten (10) years.

The value of the said system shall be ascertained as follows: The said Samuel R. Bullock and Company, their associates, successors or assigns, and the said Board of Mayor and Aldermen of the City of Vicksburg shall severally appoint one person, the two appointed shall choose a third, and the three persons thus chosen, who shall be hydraulic engineers, shall constitute a board to determine the values of said system of water works. None of the board shall be residents of the said Warren County. The said Mayor and Aldermen of the City of Vicksburg shall, within sixty days after the said board have rendered its decision, pay the amount awarded in cash. A failure to so pay the award, or to give notice of intention to

purchase shall operate as a waiver of the right to purchase until the expiration of the next succeeding period of ten years.

Sec. 10. The said Samuel R. Bullock and Company, their associates, successors or assigns shall make extensions to their lines of mains whenever called upon so to do by the Mayor and Aldermen of the City of Vicksburg, provided, however, that said extension shall not be less than five hundred feet in length and that one public fire hydrant shall be erected or located on each five hundred feet or major portion thereof, and further provided that two-thirds of the residents on the line of such extension shall agree to take water at the established rates for a period of at least two years. But the said Samuel R. Bullock and Company, their associates, successors or assigns, may voluntarily make such extension from time to time as they may deem necessary.

Sec. 11. After the works are put in operation, if at any one time the pressure gauges located at the points hereinbefore named should indicate a pressure of less than
123 twenty (20) pounds on the distributing mains at the highest point of elevation for the period of two weeks in succession, then the rental for the use and employment of the hydrants for the purpose aforesaid shall cease until the standard of pressure in this section provided shall be attained, provided, however, if the pressure indicated as aforesaid should be less than twenty (20) pounds, for two calendar months in succession, then all the rights and privileges of the said Samuel R. Bullock and Company, their associates, successors or assigns, acquired by virtue of this ordinance, shall, at the option of the said Board of Mayor and Aldermen, made in writing, cease, determine and be null and void. But nothing herein contained shall be so construed as to prevent the said Samuel R. Bullock and Company, their associates, successors or assigns, from temporarily shutting off the water from its said system or any portion thereof, for the purpose of making repairs, or extensions to the same. And no liability shall attach to the said Samuel R. Bullock and Company, their associates, successors or assigns for the suspension of the supply of water, provided the repairs or extensions or [are] made and the water turned on again without unnecessary delay. But the city shall not be liable to pay the rental for any hydrant during such

time as the proper supply of water cannot be procured therefrom.

Sec. 12. Be it further ordained that as a part of the consideration for the performance of the duties and obligations imposed on the said Samuel R. Bullock and Company, their associates, successors or assigns, the said water works and the property and business pertaining thereto and employed in and about said system shall be exempt from all municipal taxation during the first five years of their operation, and all of the property and business pertaining to and employed in and about said system of water works shall thereafter during each year of the balance of the period of this contract be assessed for taxation by said city at a valuation not to exceed the sum of fifty thousand (\$50,000.00) dollars.

121 Sec. 13. The said Samuel R. Bullock and Company, their associates, successors and assigns, shall have the right to make all needful rules and regulations governing the consumption of water, the tapping of [of] pipes, and general operation of the works, and to make such rates and charges for the use of said water as they may determine, provided that such rates shall not exceed fifty cents for each one thousand gallons of water.

Sec. 14. Be it further ordained, that for the purpose of paying the obligations and liabilities of the said Mayor and Aldermen of the City of Vicksburg which shall accrue to the said Samuel R. Bullock and Company, their associates, successors or assigns, by virtue of the terms and conditions of this ordinance, the said Mayor and Aldermen of the City of Vicksburg, or other duly constituted municipal authorities, shall annually levy and cause to be collected upon the taxable property of said city, a special tax, to be known and designated as the "Water Works Tax," sufficient to meet and pay all of said obligations and liabilities during the continuance of this contract, and until all of said obligations and liabilities shall be paid and discharged.

Sec. 15. Be it further ordained that this ordinance shall take effect from and after its approval by the Mayor.

Ordained this 18th day of November, 1886.

Approved this 19th day of November, 1886.

O. B. p. 173-180.

EXHIBIT B.

Copy of Original Bill in Case No. 41 Equity.

In the Circuit Court of the United States in and for the
Western Division of the Southern District of Mississippi.

Vicksburg Water Works Company, Complainant,
vs. No. 41. Equity.
The Mayor and Aldermen of the City of Vicksburg,
Defendant.

To the Honorable the Judges of the Circuit Court of the
United States in and for the Western Division of the
Southern District of Mississippi:

Humbly complaining, your orator, the Vicksburg Water
Works Company, a corporation duly organized and existing
under the laws of Mississippi, and a citizen of said State, and
having its principal place of business in Vicksburg, therein
brings this its bill of complaint against the Mayor and Alder-
men of the City of Vicksburg, a municipal corporation organ-
ized and existing under the laws of Mississippi, and located in
Warren County, in said State.

1st. And thereupon your orator, by the undersigned, its
solicitors in this behalf, complains and says that it and said
defendant are organized as corporations as aforesaid and that
on the 18th day of March, 1886, the said City of Vicksburg
caused its charter to be amended by the Legislature of the
State of Mississippi, in words and figures as follows, to-wit:
"To provide for the erection and maintenance of a system of
water works to supply said city with water and to that end to
contract with a party or parties who shall build and operate
water works, "whereby said city was empowered to provide
and contract for a system of water works. Which said act was
approved on the 18th day of March, 1886, and is set out in
full in the Acts of 1886 of the Legislature of the State of
Mississippi, page 695, reference to which is hereby made.

126 2nd. Your orator further shows that on the 19th
day of November, 1886, the said City of Vicksburg
received competitive bids for the best terms and conditions for

the city and for the franchise rights, etc., S. R. Bullock and Company and other bidders submitting bids; and said bids or offers were referred to the Mayor and Aldermen of the City of Vicksburg, who thereupon made an investigation of the propositions offered by the respective competitive bidders, and according to the minutes of its proceedings on day of 1886, accepted the proposition of S. R. Bullock and Company, their associates, successors and assigns as shown per Minute Book of the proceedings of the Board of Mayor and Aldermen. A copy of which minutes is hereto filed and made a part hereof, and marked Exhibit "A" to this bill. And on the day of 188...., the Mayor and Aldermen of the City of Vicksburg, pursuant to the said act of the Legislature of Mississippi, duly passed and adopted and [an] ordinance for the construction and maintenance of a system of water works, and thereby entered into a contract with said Bullock & Company therefor, a copy of which said ordinance and contract entered into between Bullock & Company, their associates, successors and assigns and defendant is hereto attached and marked Exhibit "B" and made a part hereof.

3rd. Your orator further shows that in accordance with the said contract and ordinance as provided therein, S. R. Bullock & Company were empowered to organize or create a water works company, and to sell or assign said contract and ordinance to any water works company who would supply said city and its inhabitants in accordance with the terms and provisions of said contract and accept the terms and provisions thereof.

4th. Your orator further shows that said Bullock & Company on the day of 1887, chartered and organized under the laws of Mississippi the Vicksburg Water Supply Company, a corporation. A copy of said charter is hereto attached and marked Exhibit "C" and made a
 127 part hereof. And on the first day of March, 1887, said Bullock sold and assigned said contract to the Vicksburg Water Supply Company, now and at all times a going concern, and doing business in Vicksburg, Warren County, Mississippi. A copy of said assignment is herewith filed and marked Exhibit "D" and made a part hereof. And on the day of in accordance with the terms

and provisions of said contract and ordinance, the said supply company being the assignee and bona fide owner of the same, and as required by the agreement therein contained, gave defendant notice, accepting the terms and conditions of said ordinance and contract, which notice is duly recorded on page of the Minute Book, numbered of said defendant, a copy of which notice is hereto filed and marked Exhibit "E" and made a part hereof. Said notice and acceptance of said ordinance was received and an entry thereof was made in its record, a copy of which entry is hereto attached and marked Exhibit "F" and made a part hereof.

5th. Your orator further shows that Bullock & Company proceeded to build and construct said water plant, as per specifications in said ordinance, and did build and complete said water works plant as specified in said ordinance, on or about the day of , 188. . . . And after inspection of said water works plant by defendant, the city, on the day of , 188. . . . the water works plant was accepted by said defendant, the city, as having been completed in every respect, and having fully complied with all the provisions of said ordinance and contract in every respect.

6th. Your orator further shows that since the completion and acceptance of said water works, which is a period of about fourteen years, there has never been any complaint of any kind or character whatsoever, by word or resolution by the defendant, the city, or otherwise that the water company had in any manner forfeited or violated the ordinance or contract with the defendant, the city; on the contrary, said defendant, the city, understood and knew that said water company was so faithful in and with respect to execution of its part of the ordinance that said defendant, the city, without question, issued and paid the said water company, semi-annually, the price and sum of the rental stipulated in said ordinance up to the time the city fully decided it wanted a water works of its own, which was on or about July , 1900.

7th. Your orator further shows that heretofore on the day of March, 1887, said supply company duly made, executed and delivered a deed of trust conveying all its franchises, ordi-

nances and contracts, together with all other property of whatsoever kind or nature, then or thereafter acquired, to secure the payment of its issue, \$250,000.00 of first mortgage bonds, and said deed of trust was thereupon duly recorded in said Warren County; and a copy thereof is hereto attached, marked Exhibit "X" and made a part hereof.

8th. And therefore, default having been made in the payment of interest on said bonds, the same was foreclosed on the 8th day of August, 1900, and all the said franchises, ordinances, contracts and property conveyed in said deed were sold, pursuant to the terms of said deed of trust, to the Vicksburg Water Works Company, which is evidenced by deed made and executed by trustee, recorded in Book, page, of the records of deeds of Warren County, Mississippi. The said Vicksburg Water Works Company is a corporation duly organized under the laws of Mississippi, and doing business in said City of Vicksburg, and the owner of said water works property and operating the same.

9th. Your orator further shows that on the 18th day of October, 1900, the said Vicksburg Water Supply Company executed a quit claim deed to the said Vicksburg Water Works Company, conveying all rights, title and interest it might have or hereafter acquire in said water works property, franchises, ordinances and contracts; a copy of which deed is hereto attached and marked Exhibit "G" and made a part
129 hereof.

10th. And in pursuance of the purchase by said Vicksburg Water Works Company of the said property, ordinances, franchises and contracts, the said Vicksburg Water Works Company gave the said city notice in writing of said purchase and assignment, and filed with said city its written acceptance of the terms and provisions of said ordinance; a copy of which notice and acceptance is hereto attached and marked Exhibit "H" and made a part hereof. And at the same time said company filed with and furnished to said city documentary evidence of its title and ownership of said franchises, ordinances, contracts and property.

11th. Your orator further shows that the said City of

Vicksburg has since the completion and acceptance of the said water works as aforesaid, continuously received and used the water furnished by said water works and paid for the same during the period of about fourteen years as aforesaid without question or complaint; and said water has at all times been and is now good and wholesome for public and private use and an adequate supply for the needs of said city and its inhabitants; that said water so furnished from the time said city first received and accepted the same up to the present date is, and has at all times been, the same character and supply of water as when first received and accepted by said city by said S. R. Bullock & Company, the said Vicksburg Water Supply Company and the said Vicksburg Water Works Company, and the pressure maintained has at all times been and is now greater than required by said ordinance and contract.

12th. And there has never been any complaint during said period of about fourteen years as to the character or quality of the water, nor as to the pressure nor as to any other matter from the said city nor any official or other notice that said Water Works Company was not complying in every respect in accordance with said ordinance. But after said city

130 desired to own its own water works and it was ascertained by said city that your orator, The Vicksburg Water Works Company was the owner of said first mortgage bonds, and that by virtue of the sale under the said deed of trust it would become the owner of the said water works on the 8th day of August, 1900, the city, without any notice to said Water Works Company that said city claimed said company was not complying with the terms and provisions of said ordinance and contract, arbitrarily, unjustly and illegally proceeded, as hereinafter set forth, to pass and adopt an ordinance and resolution, assuming to abrogate and take away the franchises and contract rights of your orator.

13th. Your orator further shows that the said city and its officers, confederating and conspiring to injure and destroy the credit of the said Vicksburg Water Works Company and to destroy the value of its property, assumed to abrogate and take away the franchises and contract rights of said company, while denying its (said city's) liability to pay for water used by it as provided in said contract and ordinance, and persistently and

unlawfully endeavored to disable said company from carrying on its business and to destroy its credit and the value of its property and to coerce said company to sell its water works to the city for an inadequate price.

14th. Your orator further shows that the value of its property in [is] in a large measure dependent upon its franchises and its contracts to supply said city with water, and that the value thereof is seriously impaired by the unjust and unlawful [unlawful] action of said city in assuming to abrogate and take away its franchises and contract rights as aforesaid.

15th. Your orator further shows that the said unlawful, unjust and illegal acts of said city and its officers are being done partly pursuant to an act of the Legislature of Mississippi enacted on the 9th day of March, 1900, entitled "An act to authorize the Mayor and Aldermen of the City of
131 Vicksburg to issue bonds to the amount of \$375,000 to purchase or construct, equip and maintain a water works system, construct and establish a sewerage system, to purchase ground for, erect and equip a city hall, construct the necessary buildings for a hospital, medical college, and for other purposes. Said act is contained in Acts of 1900, page 180, reference to which is hereby made, whereby said Legislature assumed to annul and abrogate the aforesaid ordinance and contract said city entered into with said Bullock & Company and their assigns in this, that by reason of said ordinance and contract said city has no right within the period of thirty years to engage in the business of supplying water to the inhabitants of said city in competition with said Bullock & Company, or their assigns, notwithstanding which, said act authorizes and permits said city to construct and maintain water works for said purpose, if unable to buy the water works at the arbitrary price fixed by said legislative act, and in pursuance of said act, and as required by its terms and conditions, an election was held in said city on the day of, 1900, at which it was voted at a majority of the cast at said election that said city should issue its bonds in the sum of \$150,000, to buy, or construct, water works for said city, all of which acts and doings on the part of said city and the Legislature of Mississippi, impaired the credit of the said Vicksburg Water Works Company and depreciated the value of its prop-

city, and tend to disable it from carrying on its business and to coerce it to sell its property for such arbitrary and inadequate price and cast a cloud upon its title, franchise and rights; and said act, or ordinance and resolution, and each of them, are in contravention of the Constitution of the United States in this, that they impair the obligations of said contract between said city and said Bullock & Company and their assigns.

16th. Your orator further shows, as hereinbefore referred to, that on the 7th day of November, 1900, said city passed a resolution and ordinance assuming to abrogate and
132 take away the franchises and contract rights of the said Vicksburg Water Works Company, a copy of which is hereto attached, marked Exhibit "I" and made a part hereof.

17th. Your orator further shows that if such act of March, 1900, and said resolution and ordinance adopted on said 7th day of November, 1900, as aforesaid, are permitted to stand, they will take away one of the most valuable assets of said Vicksburg Water Works Company, which will materially impair its value and ruin said water works in the hands of your orator, The Vicksburg Water Works Company.

18th. Your orator further shows that heretofore during the election to be held on the question of bonding the city for water works, sewerage, etc., as aforesaid, it was deemed admissible to have appointed an advisory board in conjunction with said Mayor and Aldermen of the City of Vicksburg, as to the wisdom of the expenditure of said bonds; that said Advisory Board and Mayor and Aldermen passed a resolution and gave a copy of same to your orator, requesting a reply. A copy of said resolution is hereto attached, marked Exhibit "J" and made a part hereof.

19th. Your orator further avers that the Vicksburg Water Works Company took possession of said water works on August 15th, 1900, and that the city election was held on December 6th, 1900, for city officers, and during the period between August 15th and December 6th, 1900, many of the municipal office holders and seekers from the Mayor of said city down dragged the water works into politics without the

consent and wishes of your orator, and openly stated and published in the newspapers in the city that if elected they would bring suit to cancel the contract with the water company, and charged that your orator had taken snap judgment on the city in buying said water works; copies of said publications are hereto attached, marked Exhibits and made a part hereof. All of which statements and publications were harmful and injurious to your orator greatly hampering it in carrying on its business.

133 20th. Your orator alleges the fact to be that the incorporators of said Vicksburg Water Works Company commenced negotiations to buy the water plant in the fall of the year 1899, and on January 5th, 1900, made a proposition in writing to buy the plant, which date was prior to the introduction of said act in the Legislature, authorizing the city to buy or construct a water works system, and your orator never knew that the city had any desire whatever to own a water works plant of her own at the time of such negotiations.

21st. Your orator further shows that during said municipal election, rumors of damaging affect [effect] and that were utterly false began to travel the streets of defendant, the city, and were poured into the uninformed public ear, and met great favor with the newspapers of the city having a wide and influential circulation in said city, and through their columns the papers would themselves, and also by its citizens, some of whom were candidates for office, write inflammatory and untruthful articles about your orator, all of which have given birth to an unjust public disfavor and unrighteous prejudice, which said rumors and articles were originated and circulated by officers, agents and confederates of said city, pursuant to said conspiracy and confederacy against your orator.

22nd. Your orator further shows that some time after the Vicksburg Water Works Company had bought the water works plant, and after it was well known that the city wanted the water works, or one of her own, one of the leading citizens of Vicksburg, for himself and associates, offered to buy the water works from your orator at a price exceeding \$150,000, and your orator charges the fact to be that this same citizen is today one of the advisory board, and that he is acting in that

capacity with said board in conjunction with the Mayor and Aldermen to coerce and force your orator to sell said water works at a price less than what he himself and associates offered to pay your orator.

134 23rd. Your orator further shows that suit was commenced by the City of Vicksburg in the Chancery Court of Warren County, Mississippi, to have declared void said ordinance or contract your orator has with the city, at the instigation of said board of Mayor and Aldermen and said Advisory Board, and in about sixty days from the filing of said suit your orator received a communication from said associates of said leading citizen to know if your orator now cared to sell the water works. Whether or now [not] said leading citizen and associates are confederating in conjunction with said Mayor and Aldermen in said suit, your orator is unable to state. A petition for the removal of said suit to this Court was filed by complainant herein because it involved a federal question, and the same is now pending in this Court ypon [upon] motion to remand; a copy of the said bill of complaint is hereto attached and marked Exhibit "Y" and made a part hereof.

24th. Your orator further shows that on the 29th day of Feb'y, 1890, the defendant caused to be passed an act of the Legislature of the State of Mississippi, entitled "To provide means for the construction of a sewerage system in the City of Vicksburg and [and] to issue bonds therefor," which act will be found on page 507 of the sheet acts of said body, reference to which is hereby made, and this act has never been repealed by any subsequent legislation of Mississippi.

25th. On the 9th day of March, at the instance of the defendant, the Legislature of the State of Mississippi passed an act as aforesaid, entitled "An act to authorize the Mayor and Aldermen of the City of Vicksburg to issue bonds to the amount of \$375,000 to purchase or construct, equip and maintain a water works system," etc., while said contract and ordinance entered into with said defendant, the city, was still in force, and the conditions thereof being performed by both parties without complaint from either. Your orator charges that said act of March, 1900, is unconstitutional for many reasons,

135 which will be shown to the Court on the hearing of this cause, meaning as follows, to-wit:

1st. Because it arbitrarily places the price and value upon another's property, in which defendant has no interest.

2nd. Because the Legislature of the State has by said act passed an *ex post facto* law impairing the obligations of a contract.

3rd. Because said act is in conflict with the act of 1890, page 507, providing for the construction of a sewerage system, because the Act of 1900 does not in accordance with Section . . . of the constitution of Mississippi repeal said Act of 1890.

4th. Because said Act of 1900 is local in character, when the provisions contained therein could be provided for by the general law.

5th. Because it abuses the credit of the city if these bonds are permitted to be issued and sold.

26th. Your orator would respectfully represent that about 1870 the defendant constructed a large underground gutter of about five feet in diameter on Washington Street of defendant and through the most populous part thereof for about one-half mile for the purpose of conducting away the surface water of said defendant into the Mississippi River, and which was used for that purpose solely until afterwards, as aforesaid, in 1887, as aforesaid, the Vicksburg Water Supply Company, as aforesaid, built its pumping station and intake pipe on the Mississippi River below the defendant, which arranges the pumping station of your orator with reference to the mouth of this gutter so as to locate it about two miles up said river above said station. Some time after the Vicksburg Water Supply Company was put in operation the citizens and inhabitants of defendant along or near Washington Street began to connect the water closets on their residences, hotels and stores with this gutter through the acquiescence and consent of defendant, to that extent until it has been converted into a partial sewer for said streets for said water closets of said residences, stores and hotels, and if defendant permits a general connection with this gutter for such purposes

136

the sewerage thereof will pollute the waters of said river to that extent as to make it unfit for domestic and drinking purposes as provided by said contract and ordinance with said city, and unless the use thereof is prohibited by defendant, your orator will be compelled to cut off and prevent the use of its water for such closets and sewer purposes by said residences, hotels and stores, in order that good and wholesome water may be delivered to said city and its inhabitants as is being now delivered.

27th. Your orator further charges that it has no adequate remedy at law for the damages which it has sustained by reason of the aforesaid conspiracy and unlawful acts of the defendant and others, and also that it has no remedy at law to enjoin and restrain a continuation by defendant of said unlawful actings and doings; and it charges that the continuance of said actings and doings will injure and damage your orator in the sum exceeding the amount of ten thousand dollars, and that the acts of defendant aforesaid have already damaged the complainant in its business in the sum exceeding said amount.

28. Your orator now especially shows that said ordinance or franchise Exhibit "B" provides that the defendant, the city, shall pay to your orator semi-annually, to-wit, Jan'y 1st and July 1st of each year, the price or prices named in said ordinance for the fire hydrants as stipulated and set out therein.

Your orator especially complaining shows that the defendant, the city, is now refusing to pay your orator the amount due and payable on Jan'y 1st, 1901, and only offers to pay an inadequate amount or price and under specific conditions, that if accepted by your orator would commit your orator to a false position with reference to its contract with the city; that the defendant, the city, by this scheme is confederating, conspiring and endeavoring to coerce your orator to commit

137 an act whereby the ordinance would be annulled, notwithstanding the fact that defendant has already collected from the taxpayers of defendant the full amount with which to pay this demand.

30. Your orator further shows that we have, and did offer and now offer to the defendant, the city, in writing, assuring the city that the payment for said fire hydrants due on Janu-

any 1st, 1901, as stipulated in said ordinance should in no wise prejudice said city in a suit or suits whatever pertaining to this matter; your orator agreed to do this, that in this way your orator would be able to maintain itself and continue to furnish water for fire protection to said city, and that we were, and are now willing to do so, but your orator especially alleges that it cannot keep up the enormous expenses and pay fixed charges and maintain itself and continue to deliver water for fire protection, etc., unless the defendant, the city, pays for the water as received and used by it. A copy of the proposition made to water committee, city attorney and Board of Mayor and Aldermen is hereto attached and marked Exhibit "K," and made a part hereof.

31. Your orator further shows that the water committee (after the bill was referred back to them, called a special meeting of the Board of Mayor and Aldermen on Feb'y 7th, 1901, and made the following report, to-wit:

"To the Honorable Board of Mayor and Aldermen:

Report of a Committee of Water Works upon the matter of accounts of the Vicksburg Water Works Company referred to it.

Gentlemen: Your committee would respectfully report in reference to the above subject that they have fully considered the question of the accounts presented by said company. On the first day of October, 1900, the Board of Mayor and Aldermen passed a resolution denying liability to said company by virtue of the contract entered into with Samuel R. Bullock & Company, but for the use of hydrants they would pay a reasonable and just compensation. Our powers, therefore, in the premises are limited to a report [report] based upon our decision as to what is reasonable and just.

138 We have deemed it unnecessary that we should go into any exact estimate of what is reasonable and just and therefore have proposed to said company that we will pay them from the 15th day of August up to the day of said resolution at the rate which had been before then paid, and since that time we will pay them at the rate of \$50.00 per hydrant, which we consider a most liberal rate; it being understood, however, that this arrangement should not be deemed conclusive as to what is reasonable and right to pay in the future, and after

the termination of the pending suit; neither should these payments be deemed in any way a waiver of the rights of the city in the premises.

(Signed) D. A. CAMPBELL,
T. M. CAUGHLIN,
W. O. SMITH,
Committee."

32. Your orator would show that said Board of Mayor and Aldermen received and adopted the water committee's report in words and figures as follows: "That the accounts be allowed on the basis and conditions of the committee's report." Your orator respectfully shows that said report of the water committee and the adoption of the same by the Board of Mayor and Aldermen is so worried and hedged about that if your orator should accept the payment as stipulated therein, it would acknowledge thereby or ob break the contract, in this, the defendant, the city, reserving to itself all the rights in words and figures as follows: "It being understood, however, that this arrangement should not be deemed conclusive as to what is reasonable and right to pay in the future and after the termination of the pending suit, neither would this payment be deemed in any way the waiver of the rights of the city in the premises." But no rights are reserved to your orator, and therefore, as before stated, if partial payment was accepted under the terms and conditions specified in said committee's report and Mayor and Aldermen's adoption, your orator would thereby be doing an act that could and would be construed the ending or breaking of the contract.

33. Your orator now shows that it cannot accept the proffered partial payment under the terms and conditions as specified in said water committee's report and Mayor and Aldermen's adoption, and that unless the defendant, the city, pays your orator, your orator will be unable to maintain itself and keep up the great expenses necessary to operate such a plant, discharge fixed charges as aforesaid, and while your orator is willing and anxious to furnish water for fire protection, etc., and fully carry out said contract, and have offered so to do, but as before stated is [if] defendant, the city continues to refuse to pay for said water on a basis that

each and all rights both for your orator and defendant, the city, may be equally and equitably reserved until this Honorable Court can decide the case on its merits, your orator will be unable to maintain itself and furnish water for fire protection, etc.

Wherefore, fo [for] as much as your orator can have no adequate remedy at law but only in a court of equity, where matters of this sort are cognizable and relievable, and to the end that defendant may be required to answer, but no [not] under oath (answer under oath being hereby expressly waived), each and all of the allegations hereinbefore stated, and may be required to to desist the further infringement and invasion of your orator's lawful rights and may be decreed from constructing or acquiring and operating a system of water works in competition with your orator's water works and to the end that your orator may have such other and further relief as unto your Honors may seem proper, wherefore your orator prays:

I. That defendant may be compelled to answer the promises, (not under oath).

II. That the defendant may be enjoined perpetually from assuming to abrogate and take away the franchise and contract rights of complainant, and from endeavoring to disable complainant from carrying on its business and to
 140 destroy its credit and the value of its property and coerce said complainant to sell its water works to defendant for an inadequate price, and that defendant may be enjoined and restrained from otherwise carrying on the unlawful conspiracy aforesaid entered into by it, and from doing any other illegal and unlawful act in furtherance of said unlawful conspiracy, and that said act of the Legislature of Mississippi, adopted on the 9th day of March, 1900, and said resolution and ordinance adopted and passed by said city on the 7th day of November, 1900, be decreed to impair the obligations of said contract between said city and the said Bullock & Company and their assigns, and to cast a cloud upon the title, franchise and rights of complainant, and to be invalid and of no effect as against your orator.

III. May it please your Honors to grant unto your orator

a writ of injunction issuing out of this Honorable Court, under the seal thereof, directed to the defendant, its officers, attorneys and servants, and each of them, enjoining and restraining them from assuming to abrogate and take away the franchise and contract rights of complainant, and from endeavoring to disable complainant from carrying on its business and to coerce said complainant to sell its water works to defendant for [for] the said inadequate and arbitrary price and from otherwise carrying on the unlawful conspiracy aforesaid entered into, and from doing any other illegal and unlawful act in furtherance of said unlawful conspiracy, as well as for a decree requiring and compelling them not to permit the inhabitants along Washington Street of said city from using said gutter or culvert as a sewer.

IV. May it please your Honors to grant unto your orator not only a writ of injunction, but furthermore a writ of subpoena and respondendum directed to the defendant, namely, the Board of Mayor and Aldermen of the City of Vicksburg (corporation as aforesaid); and thereby to command them upon a day certain therein named, to be and appear in this Honorable Court to answer the premises and to perform and abide by such further order of the Court as to your
 141 Honors may seem meet, to the end that your orator may have full and adequate relief in the premises.

V. Your orator would further pray for a decree against defendant for all monies due it under said ordinance with 6% interest per annum from the date of their respective maturities until it is paid.

VI. The premises considered, your orator therefore respectfully asks this Honorable Court for an injunction restraining defendant from perpetuating any minutes or ordinances or resolutions of its own whereby it denies liability or seeks to annul or refuses to pay your orator contract price for water, and that the defendant be compelled to pay your orator for water used by them as per the ordinance price and to continue to do so until this cause is heard upon its merits, and that the rights of all parties concerned may be preserved.

VII. May it please your Honors to further grant to your orator such other and further relief as the facts aforesaid may demand, and as may be in conformity with equity and good conscience and in accord with the practice in this Honorable Court as a court of equity.

And your orator will ever pray, etc.

VICKSBURG WATER WORKS COMPANY.

By S. S. HUDSON &
A. N. EDWARDS,
Its Solicitors.

State of Mississippi,

Western Division of the Southern

Judicial District of Mississippi,

City of Vicksburg. ss.:

M. O. Crumpler, of lawful age, being duly sworn on his oath, says that he is secretary, treasurer and manager of the Vicksburg Water Works Company at the City of Vicksburg, Mississippi, and that the matters and facts stated in the foregoing bill of complaint of the Vicksburg Water Works Company are true, except as to such charges as are therein stated to be upon such information and belief; and as to those he believes the said charges so made to be true; and further affiant sayeth not.

142

(Signed) M. O. CRUMPLER.

Sworn to and subscribed before me, the undersigned, this 13th day of February, 1901.

L. B. MOSELEY, Clerk.

C. D. BANKS, D. C.

Exhibit "B."

For Exhibit C (Amended and Supplemental Bill in ± 41 Equity) see Exhibit B to defendant's answer to original bill.

For Exhibit D (Answer in ± 41 Equity) see Exhibit C to defendant's answer to original bill.

For Exhibit E (Final Decree in ± 41 Equity) see Exhibit D to defendant's answer to original bill.

ASSIGNMENT OF ERRORS.

Exhibit "F."

Vicksburg Water Works Company, Complainant,
 vs. No. 41
 Mayor and Aldermen of the City of Vicksburg, Respondent.

Now comes the respondent and files the following assignment of errors upon which it will reply:

I.

That the United States Circuit Court erred in allowing the City Water Works Company to withdraw its petition filed in said cause on December 2nd, 1903, whereby it prays to be admitted as a party complainant, and also in allowing the said City Water Works & Light Company to withdraw its original bill in the nature of the supplemental bill filed in said cause on the — day of May, 1904, and the said court erred in allowing the complainant to withdraw its consent to the filing of said petition and the said original bill in the nature of a supplemental bill, the order authorizing the withdrawal of said several papers being in words and figures as follows, to-wit:

"This day came on to be heard the motion of the City Water Works & Light Company to withdraw from the files its petition herein filed December 2nd, 1902, and its original bill in the nature of a supplemental bill filed May 5th, 1904, with all exhibits and the motion of the Vicksburg Water Works Company to withdraw from the files its written consent to the filing of said bill.

And the court being fully advised in the premises doth hereby order, adjudge and decree that leave be granted as prayed for to withdraw said petition, bill, exhibits and written consent.

II.

The court erred in refusing to allow respondent to file a supplemental answer setting up that the said City Water Works

144 & Light Company was an essential party complainant
and that unless it should be made a party complainant
the court could not proceed but must dismiss the
bill.

III.

The court erred in refusing to continue the said cause on motion of respondent after it had permitted the City Water Works & Light Company to withdraw its petition and its original bill in the nature of a supplemental bill whereby it sought to be named a party complainant in said cause and after it had permitted the complainant to withdraw its consent for the City Water Works & Light Company to be made a party complainant.

IV.

The court erred in granting the complainant's motion to strike from the evidence interrogatories #135/136/137, 138/, 139/, 140/, 141/, 142/, 143/, & 147 propounded to witness M. O. Crumpler, and the answers thereto, the said interrogatories and answers being as follows, to-wit:

"X Int. 135. Mr. Crumpler, what has become of the corporation heretofore existing and known as the Vicksburg Water Works Company, have you surrendered your franchise?

Ans. We have not. It has simply sold out what property it had to the City Water Works & Light Company.

X Int. 136. It has no property of any kind whatever?

Ans. No, sir.

X Int. 137. What business is it now engaged in carrying on?

Ans. Nothing.

X Int. 138. How long since it has been engaged in carrying on business or owned any property?

Ans. First of December, 1903.

X Int. 139. What corporate act or acts, if any, has it done since the first of December, 1903.

Ans. I don't know of any except in winding up its business.

145 X Int. 140. If it has no property and is carrying on no business, what further business has it to wind up?

Ans. It is winding up the accounts that belonged to the company.

X Int. 141. It does then, as a matter of fact, still own some accounts and claims against people?

Ans. Yes, sir.

X Int. 142. Then when you said that it had no property you meant that it had no tangible property—I meant that it had no water works or anything of that kind.

Ans. Yes, sir.

X Int. 147. But it does have claims, rights, choses in action, and things of that kind, unwound up.

Ans. Yes, sir.

X Int. 147. You are the manager of the new company, the City Water Works & Light Company, the same as you were manager of the old company, the Vicksburg Water Works Company, are you not?

Ans. Yes, sir.

V.

The said court erred in rendering the final decree against respondent because the said decree is contrary to the law and the facts as stated in the pleadings and proof before said court.

VI.

The said court erred in perpetuating by its final decree the injunction against respondent restraining it from erecting a water works plant of its own.

VII.

The court erred in granting a mandatory injunction against respondent commanding respondent within one year to build and construct a sewer whereby the sewer now existing on Washington Street in the City of Vicksburg should be extended and made to discharge at some point on the Mississippi River south of the intake pipe of complainant.

sents the same to the court, and prays that such disposition be made thereof as in accordance with law and the statute of the United States in such cases made and provided, and that upon hearing the said final decree may be reversed and said cause remanded.

All of which is respectfully submitted.

Sols. for Respondent.

The above and foregoing has the following indorsement thereto, to-wit: 41 Equity. In the Circuit Court of the U. S. for Western Division of Southern District of Mississippi. Vicksburg Water Works Company vs. Mayor and Aldermen of the City of Vicksburg. Assignment of Errors. Filed the 8th day of November, 1904. L. B. Moseley, Clerk.

14
EXHIBIT II (SUMMARY OF ALVORD'S VALUATION)

John W. Alvord,
Chas. B. Burdick,
Consulting Engineers,
Chicago.

Summary

Place—Vicksburg, Miss.

By..... Date Oct. 15, 1911.

(Sinking Fund Method. Contributions at End of Year. Interest Compounded Annually.)

Item.	Reproduction on Cost.	Date of Construction.	Estimated Life in Yrs.	Int. Rate %	%	Annual Depreciation. Amt. \$	Total Depreciation. Age Factor Yrs. %	Amt. \$	Net Physical Value.
1—Preliminary development cost	4,000								4,000
2—Real estate	16,970					40,000		290	16,680
3—Cast iron pipe and specials...	80,947		100	2 1/2	.23	186,18	18 5.0	4,047	76,900
4—Valve & valve boxes.....	3,432		50	3	.89	30,54	18 21.0	721	2,711

3—Fire hydrants and public fountains

6—Laying street meters	6,430	50	3	.89	57.23	18	21.0	1,350	5,080
7—Pavements over street mains	32,820	100	2 1/2	.23	75.49	18	5.0	1,641	31,179
8—Difficult construction	26,188	100	2 1/2	.23	60.23	18	5.0	1,309	24,879
9—Service connections	3,220	100	2 1/2	.23	7.41	18	5.0	161	3,059

(a) Cast iron

(b) Lead pipe	1,292	75	2 3/4	.42	5.43	9	4.2	54	1,238
-------------------------	-------	----	-------	-----	------	---	-----	----	-------

(c) Galvanized iron

(d) Under pavements	18,579	50	3	.89	165.35	9	9.0	1,672	16,907
-------------------------------	--------	----	---	-----	--------	---	-----	-------	--------

(d) Under pavements

10—Meters, meter boxes & vaults	9,138	25	3 1/2	.57	234.85	9	27.0	2,468	6,670
---	-------	----	-------	-----	--------	---	------	-------	-------

11—The stand pipe

	7,826	45	3	1.08	84.42	9	11.0	861	6,965
--	-------	----	---	------	-------	---	------	-----	-------

Total for distribution system

	3,017	25	3 1/2	.57	77.53	4	11.0	332	2,685
--	-------	----	-------	-----	-------	---	------	-----	-------

12—The station building

	15,620	50		.89	139.02	23	29.0	4,530	11,090
--	--------	----	--	-----	--------	----	------	-------	--------

13—Pumping shaft & tunnel

	208,509				1,123.78	1		19,146	189,363
--	---------	--	--	--	----------	---	--	--------	---------

14—The brick stock

	13,506	75	2 3/4	.42	56.72	18	9.6	1,297	12,209
--	--------	----	-------	-----	-------	----	-----	-------	--------

15—The steel stock

	11,639	75	2 3/4	.42	48.88	23	13.0	1,513	10,126
--	--------	----	-------	-----	-------	----	------	-------	--------

15—The steel stock

	4,166	35	3 1/4	1.58	65.83	12	23.0	958	3,208
--	-------	----	-------	------	-------	----	------	-----	-------

	1,022	25	3 1/2	.57	26.26	2	5.0	51	971
--	-------	----	-------	-----	-------	---	-----	----	-----

27—Filter plant:

(a) Filters	11,479	75	2 3/4		47.45	£	3.7	425	11,054
(b) Filters building	1,258	25	3 1/2	2.57	32.34	£	23.0	289	969
(c) Chemical tanks & apparatus	500	15	3 3/4	5.09	25.45	£	46.0	230	270
(d & e) Filter wash pump & misc. piping		25	3 1/2	2.57	98.34	£	23.0	880	2,946
28—Clear well	8,509	30	3 1/4	2.02	171.88	£	23.0	5,786	2,723
Total for purification plant . .	53,488				493.01			11,239	42,249

Item.	Reproduction on Cost.	Date of Construction.	Estimated Life in Yrs.	Int. Rate %	Annual Depreciation.			Net Physical Value.
					%	\$	Total Amt. Yrs. %	
149	Miscellaneous.							
30—Engineering & superintendence	17,500					140.00		15,500
Carry forward miscellaneours.	17,500					140.00		15,500
Carry forward	370,362					2,962.26		324,884
Miscellaneous (Continued).								
31—General underlying costs:								
(a) Administration	8,150					70.00		7,750
(Contingent)	14,000					112.00		12,400
32—Interest during construction.	18,800					153.00		16,500
Total for miscellaneours.	59,050					3,475.00		52,150
Cost of repr. the physical property	129,412						52,376	377,034
33—Going concern, value total cost of reproduction	496,677						52,378	444,299
34—Franchise value								174,219
Total net value								613,518
35—Operating capital								5,000

EXHIBIT I.

Senate Bill No. 460.

An act to validate all municipal bonds heretofore authorized by a legal majority of the qualified electors thereof voting at an election for that purpose to be issued, when the municipal authorities have failed to take any of the preliminary legal steps for the issuance of said bonds, or for other purposes.

Section 1. Be it enacted by the Legislature of the State of Mississippi, That all municipal bonds heretofore authorized to be issued by a two-thirds majority of the qualified electors of a municipality voting at an election held for that purpose, under the provisions of Chapter 142 of the Acts of the Legislature of 1910, and of Section 3419 of the Code of 1906; or under the provisions of any municipal charter substantially in terms with the above statutes, but which have not been actually issued, notwithstanding the municipal authorities may have failed to publish notice of their proposal to issue said bonds as required by said statutes or charter, or may have failed to take any of the preliminary steps toward the issuance of said bonds prescribed thereby, be, and they are hereby, in all things made valid and legal, and when so issued the same shall be a binding obligation on the municipality issuing the same; and the provisions of this act shall apply to all municipalities whether they are operating under the municipal chapter or under their own private charter.

Section 2. That this act take effect and be in force from and after its passage.

Approved March 4th, 1912.

151 The above and foregoing has the following indorsement thereon, to-wit: No. 119 Equity. W. A. Henson, Receiver, vs. Mayor and Aldermen of the City of Vicksburg. Exhibits to Complainants Amended and Supplemental Bill of Complaint. Containing copy of Bullock franchise, Ex. "A;" copy of Original Bill in #41, Ex. "B;" copy of Amended Supplemental Bill in #41, Ex. "C;" copy of Answer in #41, Ex. "D;" copy of Final Decree, #41, Ex.

"E;" copy of Assignment of Errors in #41, Ex. "F;" copy of City's to Arbitrate, Ex. "G;" copy of Summary of Alvords Valuations, Etc., Ex. "H." Filed and ent'd Jan. 10, 1913. L. B. Moseley, Clerk. J. H. Short, D. C.

152 **MANDATE OF THE SUPREME COURT OF
THE UNITED STATES AFFIRMING THE
DECREE OF THE CIRCUIT COURT IN
EQUITY #41.**

MANDATE.

United States of America, ss.

The President of the United States of America to the Honorable Judges of the Circuit Court of the United States for the Southern District of Mississippi—Greeting:

[Seal]

Whereas, lately in the Circuit Court of the United States for the Southern District of Mississippi, before you, or some of you, in a cause between the Vicksburg Water Works Company, complainant, and the Mayor and Aldermen of the City of Vicksburg, defendant, wherein the decree of the said Circuit Court, entered in said cause on the 18th day of May, A. D. 1904, is in the following words, viz.:

This day this cause came on to be heard in accordance with the motion of complainant and defendant, filed January 12th, 1904, and the order of this Court on the hearing of this motion rendered the said January 12th, 1904, upon the original bill, amended and supplemental bill, exhibits, answer of defendants, proof and exhibits, and the Court, after hearing and attending the evidence and the arguments of counsel, and being fully advised in the premises, and being satisfied that the complainant is entitled to the relief prayed for in its original and amended and supplemental bills and for full relief; it is thereupon hereby ordered, adjudged and decreed:

First. That the defendant, the Mayor and Aldermen of the City of Vicksburg, be and is hereby perpetually enjoined from abrogating or taking away, or from assuming to abrogate

or take away the franchises or contract rights of complainant, under and by virtue of the ordinance, franchise or contract of said defendant, entitled "An ordinance to provide for a supply of water to the City of Vicksburg, in Warren County, Mississippi, and to its inhabitants, contracting with Samuel R. Bullock & Company, their associates, successors and assigns, for a supply of water for public use and giving the said City of Vicksburg an option to purchase the said works, ordained the 18th day of November, 1886, approved by John W.

153 Powell, Mayor, November 19, 1886, being the ordinance contract and franchise marked Exhibit "B," to the original bill of complaint, and said ordinance, contract and franchise being specifically and accurately set out in words and figures in the pleadings, which ordinance, contract and franchise was acquired by and is the sole and exclusive property of said complainant.

Second. That said ordinance, contract and franchise be and is hereby declared and held to be in all and every respect legal, valid and enforceable and binding upon said defendant, and said defendant is hereby perpetually enjoined from infringing, ignoring, rescinding or denying liability under said ordinance, contract and franchise in any of its parts or from in any manner disturbing or interfering with the rights, privileges and benefits acquired by complainant thereunder.

Third. That said defendant be and is hereby directed to rescind its resolution and ordinance adopted the 7th day of November, 1900, which is in words and figures as follows:

Resolved, "That the Mayor be and is hereby instructed to notify the Vicksburg Water Works Company that the Mayor and Aldermen deny any liability upon any contract for the use of the water works hydrants. That from and after August, 1900, they will pay reasonable compensation for the use of said hydrants. That the City Attorney take such action as shall be necessary to determine the rights of the city in the premises."

And also to rescind the ordinance or resolution of said defendant, adopted the 7th day of February, 1901, when the said defendant adopted the report of the committee on water works, as set out in the pleadings.

Fourth. That the said defendant refrain from in any manner accepting the benefits of or proceeding under the act of the Legislature of the State of Mississippi, approved March 9, 1900, and from issuing bonds under and by virtue of said act, or any other act, or ordinance, for the purpose of erecting water works of its own during the period prescribed in said ordinance contract and franchise.

Fifth. That the said defendant refrain from constructing water works of its own until the expiration of the period prescribed in the said ordinance contract and franchise dated 18th day of November, 1886.

154 Sixth. That the said defendant be and is hereby required to pay all monies due or owing or may hereafter be due or owing to said complainant, under and by virtue of said ordinance, contract and franchise.

Seventh. That the said defendant be and hereby is perpetually enjoined from making or adopting any resolution or ordinance refusing to pay the contract price of water fixed by said ordinance, contract and franchise until the expiration of the period prescribed in said ordinance, contract and franchise.

Eighth. That the said defendant be and is hereby enjoined from permitting any further connections for the conveyance of sewerage or excremental matter with the storm sewer or culvert located on Washington Street, City of Vicksburg, and the defendant is hereby directed and commanded within twelve months from this date, to extend said sewer or culvert and construct an outlet therefor, so as to discharge said sewerage and excremental matter into the Yazoo or Mississippi River, below the intake pipe of complainant; provided, that if the defendant is unable to construct or extend said sewer or culvert and construct said outlet within twelve months from this date, it can apply to this Court for good cause shown for an extension of time beyond the said period of twelve months.

Ninth. That said defendant pay the costs of this cause to be taxed.

Ordered, adjudged and decreed this 18th day of May, 1904.

H. C. NILES, Judge.

As by the inspection of the transcript of the record of the said Circuit Court, which was brought into the Supreme Court of the United States by virtue of an appeal, agreeably to the Act of Congress, in such case made and provided, fully and at large appears.

And, whereas, in the present term of October, in the year of our Lord one thousand nine hundred and five, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged and decreed by this Court that the decree of the said Circuit Court in this cause be and the same is hereby modified in respect to granting a mandatory injunction as to the sewer mentioned therein, and as so modified, be and the same is hereby affirmed with costs; and that the said complainant, the Vicksburg Water Works Company, recover against the said defendant for its costs herein expended and have execution therefor.

May 21, 1906.

You therefore are hereby commanded that such execution and proceedings be had in said cause, as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 25th day of June, in the year of our Lord one thousand nine hundred and six.

Costs of complainant:

Clerk.....Paid.

Printing record.....Cy.

Attorney.....Defendant.

JAMES H. McKINNEY,

Clerk of the Supreme Court of the United States.

The foregoing is indorsed as follows: File No. 19551. Supreme Court of the United States. No. 133. October term, 1905. The Mayor and Aldermen of the City of Vicksburg vs. The Vicksburg Water Works Company. Mandate. Filed and entered Jun. 27, 1906. L. B. Moseley, Clerk. J. H. Short, D. C."

156 **OPINION OF THE SUPREME COURT OF THE
UNITED STATES ON APPEAL OF SUIT
NO. 41 EQUITY.**

Reported in Vol. 202, U. S. 453.

Mr. Justice Day delivered the opinion of the Court.

This case was before this court at the October term, 1901, and it is reported in 185 U. S. 65. It was then here upon the question of jurisdiction, and it was held that it presented a controversy arising under the Constitution of the United States, such as gave the Circuit Court jurisdiction. There was no diversity of citizenship, and the bill was filed by the Vicksburg Water Works Company, a corporation of the State of Mississippi, against the Mayor and Aldermen of the City of Vicksburg, a municipal corporation of the same State. In view of the full statement of the contents of the bill and the amended bill in the case, as reported in 185 U. S., it is unnecessary to repeat it. On the present appeal a motion to dismiss or affirm was made, which was passed, to be heard with the merits. We regard the decision of this court, when the case was here at the former term, as settling the question of jurisdiction, and affirmatively determining that upon the bill and amended bill the complainant alleged a case which involved the application of the Constitution of the United States and appealable to this Court, within Section 5 of the Act of March 3, 1891, as amended. (26 Stat. 827.)

The suit was brought by the Water Works Company, claiming an exclusive right as against the city under a contract with it for the construction and maintenance for a period of thirty years of a system of water works, which exclusive contract, it was alleged, would be practically destroyed if subjected to the competition of a system of water works to be erected by the city itself, which was in contemplation under authority of an act of the Legislature of Mississippi, authorizing the Mayor and Aldermen of the City of Vicksburg to issue bonds to the amount of \$375,000 to purchase or construct a water works system and a sewer system, and for certain other purposes.

That act, among other things, required the vote of
157 the electors of the city upon the question of issuing
bonds and constructing or buying water works; an
election was held, and it was voted by a majority of the votes

cast that the city should issue bonds to the sum of \$150,000 to purchase or construct water works for the city. A resolution was passed by the municipal authorities instructing the Mayor and Aldermen to notify the Water Works Company that liability was denied upon the contract for the use of the water works hydrants, and that from and after August, 1900, the city would pay a reasonable compensation for the use of said hydrants. A bill was filed in the Equity Court in Warren County, Mississippi, averring that the original contract to which the Water Works Company claimed to have succeeded was null and void; that the Mayor and Aldermen had exceeded their powers in making the contract for thirty years; that rates charged to consumers were exorbitant and illegal; that the Mayor and Aldermen at a meeting held on November 5, 1900, had resolved that they no longer recognized any liability under said contract; that the Vicksburg Water Supply Company (a former holder of said contract) and the complainant had no rights in said contract, and the city was entitled to have the same cancelled and annulled. And it was held in 185 U. S. that the facts taken together presented something more than a case of mere breach of private contract, and disclosed an intention and attempt by subsequent legislation of the city to deprive the company of its rights under the existing contract, and it was said: "Unless the city can point to some inherent want of legal validity in the contract, or to some disregard by the Water Works Company of its obligations under the contract as to warrant the city in declaring itself absolved from the contract, the case presented by the bill is within the meaning of the Constitution of the United States and within the jurisdiction of the Circuit Court as presenting a Federal question." And it was further held

158 that it was a valuable feature of equity jurisdiction to anticipate and prevent threatened injury, and the conclusion was reached that the allegations of the bill made a case for an injunction. The case was thus brought within Section 5 of the act of March, 1891, as one in which the appeal is directly to this court. See also upon this point *Penn Mutual Life Insurance Co. v. Austin*, 168 U. S. 685. The motion to dismiss will be overruled.

Upon the case going back to the Circuit Court an answer was filed raising issues as to whether the complainant had accepted and performed the agreement in its contract to supply

water to the city, and denying the right of the complainant to have and to own the contract and the authority of the city to make an exclusive contract, and detailing other matters not necessary to further set forth.

Certain questions of fact as to the character of the water supplied by the complainant, the pressure maintained and similar questions were decided by the Circuit Court in favor of the appellees. An examination of the record makes it sufficient for us to say that we find no reason for disturbing the conclusions of the Circuit Court upon these questions.

The decree in the court below as in favor of the Water Works Company, maintaining its right to the contract for hydrant rentals and enjoining the city, during the period of the contract, from constructing a water works system of its own, and requiring the city to construct a sewer for the disposal of house sewerage from the city.

The assignments of error necessary to be considered are:

1. As to the alleged error of the court below in permitting a corporation known as the City Water Works and Light Company, which had intervened in the case, to withdraw from the files its original bill in the nature of a supplemental bill, and striking out certain testimony which had been taken
159 concerning the same.

2. In enforcing the contract with the city in favor of the complainant and restraining the city from erecting water works of its own during the term covered by the contract with the complainant.

3. In requiring the construction of the sewer by the city.

We shall proceed to notice these in the order named.

The City Water Works and Light Company, on December 2, 1903, filed its petition praying to be admitted as a party complainant in the cause, and set up that it was the owner of the contract sued upon. To this petition the city answered, denying that the City Water Works and Light Company had purchased, by deed or otherwise, or owned the property, real and personal, of the complainant the Vicksburg Water Works Company, and denying that the City Water Works and Light Company had any interest in the subject-matter of the suit

or should be admitted as a party complainant therein. The City Water Works and Light Company then filed its original bill in the nature of a supplemental bill, on May 5, 1904, after the city had denied that it had any interest in the suit. On May 13, 1904, it filed a motion asking leave to withdraw its petition and bill from the files, which motion was granted by the court, and the motion of the Vicksburg Water Works Company to withdraw from the files its written consent to the filing of the bill was also sustained, and the court granted the withdrawal of the petition, bill, exhibits and written consent. Thereupon the city offered a supplemental answer, and asked the court for leave to file the same. This answer made allegations setting forth the transfer of the contract to the City Water Works and Light Company, and asked for a continuance of the cause, with leave to take testimony to support the averments of this supplemental answer.

160 The court, on the same day, May 13, 1904, overruled the city's motion for leave to file the supplemental answer and for continuance with leave to take testimony in support thereof, and proceeded to hear the case upon the original pleadings and proofs. It also permitted the withdrawal of certain testimony referring to the City Water Works and Light Company and the transfer of the contract to it. In view of the action of the court upon the pleadings as to the City Water Works and Light Company, this testimony had become immaterial.

In the action of the court just recited we can find no ground for a reversal. The City Water Works and Light Company had come into the case claiming an ownership of the contract, which was denied by the city; certain testimony was filed concerning this claim of the company. We think it was discretionary with the court to permit the withdrawal of these pleadings and the suppression of this testimony, and it was likewise within its discretion to permit or deny a further answer by the city setting up the alleged transfer of ownership. These matters, except in cases of gross abuse of discretion, are within the control of the trial court. *Chapman v. Barney*, 129 U. S. 377, 681; *Dean v. Mason*, 20 How. 198, 204.

The principal controversy in the case is as to the correctness of the decree of the court below restraining the city from erecting water works of its own within the period named in

the contract, which decree proceeded upon the theory that the city had excluded itself from erecting or maintaining a system of water works of its own during that period. The contract for the construction of the water works was originally made on November 18, 1886, by an ordinance of that date, granting to Samuel R. Bullock & Company, their associates, successors and assigns, the right and privilege to construct a water works system in the City of Vicksburg, for the period of thirty years from the date of the ordinance. Section 1 of the ordinance provided that, in consideration of the public benefit to be derived therefrom, the exclusive right and privilege was granted for the period of thirty years from the time the ordinance took effect, to Samuel R. Bullock & Company, their associates, successors and assigns, to erect, maintain and operate a system of water works in accordance with the terms of the ordinance, and of using the streets, alleys, etc., within the corporate limits of the city, as they then existed or might thereafter be extended, for the purpose of laying pipes and mains and other conduits, and erecting hydrants and other apparatus for the obtaining of a good water supply for the City of Vicksburg and for its inhabitants, for public and private use. There was a stipulation for certain hydrants for the term of thirty years at an annual rental of \$65.00 each, and it was provided that Bullock & Company, their associates, successors and assigns, might procure the organization of a water works company and assign their rights and privileges under the ordinance to such corporation. It is disclosed in the record that Bullock & Company procured the organization of a water works company, the Vicksburg Water Supply Company, which company executed a mortgage to the Farmers' Loan & Trust Company of New York, which included "All of its real and personal property, goods, chattels, owned now or which may hereafter be acquired by it, including its land, rents, water works, buildings, pump houses, stand pipes, reservoirs, machinery, pipes, mains, hydrants, apparatus and equipments, situated in the City of Vicksburg, County of Warren, State of Mississippi, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the reversion, and reversions, remainder and remainders, tolls, rents, issues, income, profits accruing

therefrom; also all and singular the corporate franchises, privileges, rights, liabilities which the Water

162 Company now has and can exercise, or shall hereafter acquire and possess, and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the Water Company, of and to the property above described or hereafter to be acquired, and each and every part and parcel thereof, with the appurtenances, to have and to hold all and singular the above granted and described premises with the appurtenances unto the trustee and its successors forever." Upon the foreclosure of this mortgage the property was bid off by M. O. Crumpler on the eighth day of August, 1900. He assigned his bid to the Vicksburg Water Works Company, complainant in this case, and the Vicksburg Water Supply Company on October 18, 1900, by a quit claim deed, conveyed all the property described in the deed of trust to the Farmers' Loan & Trust Company to the Vicksburg Water Works Company.

A preliminary question is made that the Vicksburg Water Works Company did not acquire title to the contract rights by virtue of these proceedings. But we are cited to an act of the Legislature of Mississippi, approved March 7, 1882, Laws of 1882, p. 50, which upon its face is broad enough to authorize such corporations to borrow money and secure the payment of the same by mortgage or deed of trust upon their property and franchises, and we think the mortgage in question which include the contract rights of the Vicksburg Water Supply Company, and that they would pass by the sale and subsequent quit claim deed to the Vicksburg Water Works Company. Where a company is authorized to mortgage its franchises and rights, these may be sold and the purchaser acquire title thereto at foreclosure sale, although the corporate right to exist may

not be sold. *Memphis R. R. Co. v. Commissioners*, 163* 112 U. S. 609. The power to mortgage the privilege and rights of the corporation must necessarily include the power to bring them to sale to make the mortgage effectual. *New Orleans &c. R. R. Co. v. Delamore*, 114 U. S. 501, cited and followed in *Julian v. Cent. Trust Co.*, 193 U. S. 93, 106. We think the mortgage in this case covered and the decree passed the contract rights given originally to the Vicksburg Water Supply Company by the ordinance of November 18, 1886.

It is further urged that the Vicksburg Water Works Company was organized after the taking effect of the Constitution of Mississippi of 1890, which provided: "Sec. 178. Corporations shall be formed under general laws only. The Legislature shall have power to alter, amend or repeal any charter of incorporation now existing and revocable, and any that may hereafter be created, whenever, in its opinion, it may be for the public interests to do so; provided, however, that no injustice shall be done to the stockholders." And it is insisted that the subsequent legislative authority given to the city to issue bonds and build its own water works amounted to a repeal of the exclusive feature of the grant in the ordinance of 1886, if any it contained. We are cited in support of that proposition to the case of the Hamilton Gas Light & Coke Co. v. City of Hamilton, 146 U. S. 258, considering the provisions of the Constitution of Ohio as to altering or revoking corporate privileges. But we think the right of the Vicksburg Water Works Company was acquired under the foreclosure and sale of the contract rights conferred in the ordinance of 1886 and covered in the mortgage, as we have stated. Furthermore, the Mississippi Constitution contains this provision, which is not in the Ohio Constitution, considered in the Hamilton case, namely, "Provided, (in exercising the right of amendment or repeal of a charter) no injustice shall be done to the stockholders." If it be true that the complainant

164 below had a binding contract excluding competition by the city in furnishing a water supply for the period of thirty years, we think it would be a palpable injustice to the stockholders to permit the competition of the city by new works of its own; which, whether operated profitably for the municipality or not, might be destructive of all successful operation in furnishing water to consumers by the private company.

Coming directly then to the question whether this is an exclusive contract, the question resolves itself into two branches. Had the city the right to make a contract excluding itself? And, if so, has the contract now under consideration that effect? The Legislature of the State of Mississippi on March 8, 1886, in the charter of the City of Vicksburg, among others, gave to the city the following powers: "To provide for the erection and maintenance of a system of water works to supply said city with water, and to that end to contract

with a party or parties who shall build and operate water works." The question is now, not whether the city might make a contract giving the exclusive right as against all third persons to erect a system of water works, but whether it can, in exercising this legislative power, exclude itself from constructing and operating water works for the period of years covered by the contract. It is said the Supreme Court of Mississippi has denied this power, and we are referred to *Collins v. Sherman*, 31 Mississippi, 679; *Gaines vs. Coates*, 51 Mississippi, 355, and *Greenville Water Works Co. v. City of Greenville*, 7 So. Rep. 409.

We do not think any of these cases decisive of the point. In *Collins vs. Sherman*, it was held that the charter granting the right to a turnpike and ferry company to maintain a ferry upon a particular river, which contained no grant of exclusive right, did not prevent the Legislature from afterwards incorporating another company authorized to
 165 establish a turnpike and ferry upon the same river and upon the same line of travel, although the establishment of the latter company might materially impair the value of the franchise granted to the first company. The cases were cited and the general principles stated that exclusive privileges could not be granted by implication; there was no attempt to make the first franchise exclusive in that case. In *Gaines vs. Coates*, it was held that the act in question did not confer upon a certain corporation the exclusive privilege of weighing cotton; that there was nothing in the charter indicating any intention to confer an exclusive right, and many cases were cited, including a number from this court, to the effect that exclusive privileges are not to be granted by implication. In *Greenville Water Works Co. v. City of Greenville*, the City of Greenville made a contract with the Greenville Water Works Company to build a system of water works by a certain time, but the company had failed to comply with the contract, the time was extended and the company again defaulted. The city thereupon cancelled the contract and made a new contract with the Delta Water Works Company. Then the Greenville Water Works Company filed a bill to enjoin the city and the other company from carrying out the contract and prayed for a specific performance of its contract with the city. The court held that there was no power given by the charter of the City of Greenville to grant a monopoly

for a long series of years for supplying the city and its inhabitants with water. The question whether the city could exclude itself in such a contract as we have now before us was not met or passed upon. But if the doctrine of Mississippi were otherwise, and with due respect to which the decisions of its highest court are justly entitled, it has been frequently held, in passing upon the question of contract, in circumstances such as exist in this case, involving

166 the constitutional protection afforded by the Constitution of the United States, this Court determines the nature and character thereof for itself. (*Douglas v. Kentucky*, 168 U. S. 488.) And we think the question of the power of the city to exclude itself from competition is controlled in this court by the case of *Walla Walla vs. Walla Walla Water Company*, 172 U. S. 1. In that case the city charter of Walla Walla provided, Section 10, that no exclusive grant should be made nor should prevent the Council from granting the right to others, and Section 11 provided: "The City of Walla Walla shall have power to erect and maintain water works within or without the city limits, or to authorize the erection of the same for the purpose of furnishing the city, or the inhabitants thereof, with a sufficient supply of water." The contract was made for twenty-five years. The grant was not made exclusive to the Water Works Company, but the city agreed not to erect water works of its own, and reserved the right to take, condemn and pay for the works of the company at any time after the expiration of the contract. It was held by this court that the city might thus exclude itself from competition during the period of the contract, and of this feature of the contract the following pertinent language was used by Mr. Justice Brown, who delivered the opinion of the court: "An agreement of this kind was a natural incident to the main purpose of the contract, to the power given to the city by its charter to provide a sufficient supply of water, and to grant the right to use the streets of the city for the purpose of laying water pipes to any persons or association of persons for a term not exceeding twenty-five years. In establishing a system of water works the company would necessarily incur a large expense in the construction of

167 the power house and the laying of its pipes through the streets, and, as the life of the contract was limited to twenty-five years, it would naturally desire to pro-

teet itself from competition as far as possible, and would have a right to expect that at least the city would not itself enter into such competition.....

"Cases are not infrequent where, under a general power to cause the streets of a city to be lighted, or to furnish its inhabitants with a supply of water, without limitation as to time, it has been held that the city has no right to grant an exclusive franchise for a period of years; but these cases do not touch upon the question how far the city, in the exercise of an undoubted power to make a particular contract, can hedge it about with limitations designed to do little more than bind the city to carry out the contract in good faith and with decent regard for the rights of the other party."

In the Walla Walla case the same general power to make the contract existed. There was an express provision against making an exclusive contract, and this court held that for the period mentioned in the contract, and as incident to the protection of the rights of the contractor, the city might exclude itself from competition. We think that case is decisive of the present one on this proposition.

We shall proceed to consider where the language of the contract is such as to prevent the city, during the period named therein, from erecting a water works of its own.

The case of Lehigh Water Company's Appeal, 102 Pa. St. 515, cited by counsel for appellant, is not in point. The act provided "the right to have and enjoy the franchises and privileges of such incorporation within the district or locality covered by its charter shall be an exclusive one; and no other company shall be incorporated for that purpose until the said corporation shall have, from its earnings, realized and divided among its stockholders, during five years, a dividend equal to eight per centum per annum upon its capital stock." Of this grant Mr. Justice Paxson, who delivered the opinion of the court, observed, "While

168 the language from the act of 1874 above quoted would seem to favor the exclusive right claimed by the water company, a careful examination of clause 3 of Section 34 shows that the Legislature intended that the right should be exclusive only as against other water companies, for immediately in this connection occur the words: 'And no other company shall be incorporated for that purpose until the said corporation shall have from its earnings, realized and divided among its stock-

holders, during five years, a dividend equal to eight per centum per annum upon its capital stock.' The provision that another company shall not be incorporated was not intended to prohibit a city or borough from providing its citizens with pure water by means of works constructed by itself from money in its own treasury."

In considering this contract we are to remember the well established rule in this court which requires grants of franchises and special privileges to be most strongly construed in favor of the public, and that where the privilege claimed is doubtful nothing is to be taken by mere implication as against public rights. This rule has been applied to a series of contracts in water works and lighting cases, and we have no disposition to detract from its force and effect. And unless the city has excluded itself in plain and explicit terms from competition with the Water Works Company during the period of this contract it cannot be held to have done so by mere implication. The rule, as applied to water works contracts, was last announced in this court in *Knoxville Water Company vs. Knoxville*, 200 U. S. 22, decided at this term, citing previous cases.

The contract in the respect under consideration is found in Section 1 of the ordinance, and undertakes to give to Bullock & Company, their associates, successors and assigns, the exclusive right and privilege, for the period of thirty years, from the time the ordinance takes effect, of erecting, maintaining and operating a system of water works, with certain privileges named, for the furnishing of a supply of good water to the City of Vicksburg and its inhabitants, for public and private use.

Without resorting to implication or inserting anything by way of intendment into this contract, it undertakes to give by its terms to Bullock & Company, their associates, successors and assigns, the exclusive right to erect, maintain and operate water works, for a definite term, to supply water for public and private use. These are the words of the contract and the question upon this branch of the case is, conceding the power of the city to exclude itself from competition with the grantee of these privileges during the period named, has it done so by the express terms used? It has contracted with the company in language which is unmistakable, that the rights and privileges named and granted shall be exclusive. Con-

consistently with this grant, can the city submit the grantee to what may be the ruinous competition of a system of water works to be owned and managed by the city, to supply the needs, public and private, covered in the grant of privileges to the grantee? It needs no argument to demonstrate, as was pointed out in the Walla Walla case, that the competition of the city may be far more destructive than that of a private company. The city may conduct the business without regard to the profit to be gained, as it may resort to public taxation to make up for losses. A private company would be compelled to meet the grantee upon different terms and would not likely conduct the business unless it could be made profitable. We

cannot conceive how the right can be exclusive, and
 170 and the city have the right at the same time to erect and maintain a system of water works, which may and probably would practically destroy the value of rights and privileges conferred in its grant. If the right is to be exclusive, as the city has contracted that it shall be, it cannot at the same time be shared with another, particularly so when such division of occupation is against the will of the one entitled to exercise the rights alone. It is difficult to conceive of words more apt to express the purpose that the company shall have the undivided occupancy of the field so far as the other contracting party is concerned.

The term "exclusive" is so plain that little additional light can be gained by resort to the lexicons. If we turn to the Century Dictionary we find it defined to mean "Appertaining to the subject alone; not including, admitting or pertaining to any other or others; undivided, sole; as, an exclusive right or privilege; exclusive jurisdiction." We think, therefore, it requires no resort to implication or intendment in order to give a construction to this phrase of the contract; but, on the other hand, the city has provided and the company has accepted a grant which says in plain and apt words that it shall have an exclusive right, a sole and undivided privilege. To hold otherwise in our view would do violence to the plain words of the contract, and permit one of the contracting parties to destroy and defeat the enjoyment of a right which has been granted in plain and unmistakable terms. On the authority of the Walla Walla case, the city had the power to exclude itself for the term of this contract, giving the words used only the weight to which they are entitled, without

strained or unusual construction, and we think it was distinctly agreed that for the term named the right of furnishing water to the inhabitants of Vicksburg under the terms of the ordinance was vested solely in the grantee, so

171 so far at least as the city's right to compete is concerned. Any other construction seems to us to ignore the language employed and to permit one of the parties to the contract to destroy its benefit to the other. We think the court below did not err in reaching this conclusion.

The Court decreed as to a sewer, which the record discloses was originally a surface water sewer, that the city should refrain from permitting future connections therewith for the conveyance of house sewage. The company complaining that this sewer entered into the source of supply above the intake of the water works, the court by a mandatory injunction required the City of Vicksburg to extend the sewer and construct an outlet therefor, so as to discharge sewage into the Yazoo or Mississippi River, below the intake of the complainant, provided, if the city was unable to construct such sewer within twelve months from date, application might be made to the court for an extension of time. The error assigned in this behalf is as to the award of the mandatory injunction. We think the court erred in this respect and that it had no authority to issue a mandatory injunction requiring the city to construct a sewer, irrespective of the exercise of discretion vested by law in the municipal authorities to determine the practicability of the sewer ordered, the availability of taxation for the purpose, and the like matters; and we think that the exercise of this authority is primarily vested in the municipality and not in the courts.

We find no error in the decree of the Circuit Court enforcing the contract rights of the complainant and enjoining the city from erecting its own works during the terms of the contract, but error in granting a mandatory injunction as to the sewer, and in that respect the decree will be modified, and, as so modified, affirmed.

Mr. Justice Harlan dissenting. I cannot agree to the opinion and judgment in this case.

172 In my opinion the City of Vicksburg had no authority under the Constitution and laws of Mississippi to give an exclusive right to any person or

corporation to maintain a system of water works for the benefit of that city and its people.

But if I am wrong in this view, it ought not, in my judgment, to be held upon the present record that the city has, by ordinance or otherwise, precluded itself from establishing and maintaining, at its own expense, a system of water works for the benefit of its people. The contrary cannot be maintained, unless we hold that a municipal corporation may, by mere implication, bargain away its duty to protect the public health and the public safety as they are involved in supplying the people with sufficient water. Nothing can be more important or vital to any people than that they should be supplied with pure, wholesome water. And yet it is now held that it was competent for the City of Vicksburg, by mere implication, to so tie its hands that it cannot perform the duty which it owes in that regard to its people.

173

NOTE OF EVIDENCE.

In the District Court of the United States for the Western
Division of the Southern District of Mississippi.

W. A. Henson, Receiver.

vs.

No 119 In Equity

The Mayor and Aldermen of the City of Vicksburg.

Memorandum of Evidence.

Complainant read:

1. Original bill (and exhibits).
2. Amended and supplemental bill (and exhibits).
3. Replication.
4. Supplemental bill, filed Dec. 27, 1912.
5. Restraining order thereon.

6. Motion for preliminary injunction and service thereof.
7. Replication to answer to supplemental bill, filed Dec. 27, 1912.
8. Petition of Lelia Boykin to be made a party complainant.
9. Answer of complainant to petition of Lelia Boykin to be made party complainant.
10. Order of court allowing Lelia Boykin to be made party complainant.
11. Deposition of A. M. Paxton, taken by defendant, and exhibits thereto.
12. Deposition of L. P. Cashman and exhibits.
13. Deposition of E. A. Fitzgerald and exhibits.
14. Deposition of Charles E. Wright and exhibits.
15. Deposition of John G. Cashman and exhibits.
16. Deposition of Jno. W. Alvord and exhibits.
17. Agreement as to deposition of A. M. Paxton and Abe Kiersky as to qualified electors and taxpayers and exhibits.
- 174 18. Amendment to the charter of the City of Vicksburg of May 1, 1905.
19. Amendment to the charter of the City of Vicksburg of November 6, 1911.
20. Deposition of M. O. Crumpler and exhibits.
21. Certified copy of resolution of defendant of December 17, 1912.

22. Exhibit A to the original bill Bullock franchise.
23. Exhibit B to original bill, being original bill in Vicksburg Water Works Co. vs. Mayor and Aldermen of City of Vicksburg, No. 41 in Equity.
24. Exhibit C to original bill being amended and supplemental bill in said suit No. 41 in Equity.
25. Exhibit D. Answer of Mayor and Aldermen of the City of Vicksburg to original and supplemental bill in said suit, No. 41 in Equity.
26. Exhibit E to original bill, being final decree of District Court of the United States for the Western Division of the Southern Division of Mississippi in said suit No. 41 in Equity.
27. Exhibit F to original bill, being assignment of errors in the Supreme Court of the United States on appeal from the final decree in said suit No. 41 in Equity.
28. Mandate of the Supreme Court of the United States affirming the decree of said District Court in said Equity suit No. 41.
29. Opinion of the Supreme Court of the United States on appeal of said suit No. 41 in Equity, reported in 202 U. S. Rep. 453.
30. Exhibit G to original bill being proposition of City of Vicksburg to arbitrate.
31. Exhibit H to original bill being the estimate of value of water works by Jno. W. Alvord.

Defendant read:

1. Answer to original bill and exhibits.
2. Answer to amended and supplemental bill.

3. Answer to supplemental bill, filed Dec. 27, 1912.
4. Answer to petition of Lelia Boykin to be made a party complainant.
- 175 5. Agreed depositions of A. M. Paxton, J. D. Laughlin, and J. H. Short, with exhibits.

This was all the evidence in the case this January 10, 1913.
H. C. NILES, Judge.

The above and foregoing has the following indorsement thereon, to-wit: No. 119 in Equity. W. A. Henson, Receiver, Mayor & Aldermen of Vicksburg. Note of Evidence. Filed & ent'd Jan. 11, 1913. L. B. Moseley, Clerk. J. H. Short, D. C.

176 ORDER TAKING UNDER ADVISEMENT.

In the District Court of the United States for Western Division of Southern District of Mississippi.

W. A. Henson, Receiver,

vs.

Mayor and Aldermen of the City of Vicksburg.

By consent of counsel it is ordered that this cause be taken under advisement to be decided in vacation as of the January Term, 1913, of this court. This 11th day of January, 1913.

H. C. NILES, Judge.

The above and foregoing has the following indorsement thereon, to-wit: 119 Equity. W. A. Henson, Receiver, vs. Mayor & Aldermen of the City of Vicksburg. Order. Filed & ent'd Jan. 11, 1913. L. B. Moseley, Clerk. J. H. Short, D. C.

177 **Mr. A. M. PAXTON**, City Clerk and Keeper of Records of the City of Vicksburg, was introduced as a witness on behalf of the defendant, and testified in substance as follows:

"The sum of \$129.00 was paid out by the City of Vicksburg, Mississippi for the publication and distribution of a certain pamphlet and of a certain newspaper article published in the Monday morning Democrat on January 1st, 1912, prior to the bond election called and held for the purpose of voting bonds to build a water works system in the City of Vicksburg; the items of said account being \$97.00 for the publication of the said pamphlet and for envelopes to distribute the same, \$32.00 for postage stamps used in mailing the said pamphlets to registered voters in the City of Vicksburg and \$10.00 for said newspaper article.

The said pamphlet, among other things, contains the following:

"A careful reading of the pamphlet's contents will enable you to vote intelligently on the bond issue in question on February 11, 1912."

On the first and second pages of said pamphlet there appears a letter signed by Ben H. Stein, Chairman; P. M. Harding, H. H. Davis and J. J. Hayes, Committee.

This letter, among other things, contains the following:

"To this end an election has been called for the purpose of securing the consent of the voters to a bond issue. Should the bond issue be authorized, the city will build its own water works system unless the Vicksburg Water Works Company shall offer its present plant at a price deemed reasonable by the Mayor and Aldermen. If this shall be done the bonds authorized at the forthcoming election will not be issued, but a new election will be held to determine whether or not the people of Vicksburg wish to purchase at the price deemed reasonable by the Mayor and Aldermen. The whole question is of such importance that it should be finally determined by the people themselves."

Pages 3 to 30 inclusive of the said pamphlet contain the

report of A. L. Dabney, engineer, to Ben H. Stein, Esq., Chairman Water Works Committee.

This report contains first an estimate of the cost of constructing a new system of water works, and, second, an estimate of the value of complainant's system of water works now in operation in said city.

A condensed estimate of the value of the cost of the proposed new system will be found on page 13 of the report and is as follows:

Land and grading	\$ 6,000
Intake crib and two lines 20 inch suction pipe.....	3,500
Tunnel for suction pipe	5,000
Pump pit	6,000
Power house	8,000
Concrete stack	2,500
Boilers and appurtenances, including mechanical stokers for two boilers and steam piping for the plant.	15,000
Pumps, high service, erected with foundations: One 4 million gallon triple reciprocating and two 3 million gallon rotary, driven by steam turbines...	28,000
Pumps, low service erected with foundations: Three 3 million gallon turbine pumps with vertical shafts and steam turbines	13,000
2 Settling basins, each with a capacity of 750,000 gallons	13,000
Filters with nominal capacity of 2 million gallons every 24 hours, and reserve area and additional tanks to increase to 3 million gallons capacity....	15,000
Filtered water basins, total capacity 750,000 gallons, covered with composition roof.....	8,000
Piping about plant	4,000
	<hr/>
	\$127,000

Mains and Distribution System.

10,400 feet of 16 inch pipe at \$2.50.....	\$ 26,000
15,000 feet of 12 inch pipe at 1.60.....	24,000
7,440 feet of 10 inch pipe at 1.25.....	9,300
15,800 feet of 8 inch pipe at .95.....	15,010
81,557 feet of 6 inch pipe at .70.....	57,090

12,000 feet of 4 inch pipe at .50.....	6,000
Valves and 245 hydrants	11,000
Add special cut off valves for 80 hydrants.....	1,000
6 Pressure controllers	1,200
7 Concrete drinking fountains	400

\$278,000

Repairing pavements at 90 cents per lineal ft.....	18,000
Supervision, engineering and contingencies, 15 per cent ...	44,000

\$340,000

On page 25 appears a "Summary of Items in Vicksburg Water Works Company's plant and value to the City of same," as follows:

Land	\$ 9,000.00
Suction pipe	1,200.00
Tunnel for suction pipe	1,500.00
Pump pit.	
Pumping station building	3,500.00
New steel stack, included with boilers.	
Old brick chimney	284.00
Two water tube boilers with settings.....	4,862.50
Automatic stokers	2,000.00
179 Two fire tube boilers	500.00
Feed water heaters and two boiler feed pumps ...	652.90
High duty pump—cross compound, crank and fly wheel, 5 3/4 million gallons capacity.....	17,775.00
Two Dean pumps 2 1/4 millions capacity each....	3,966.67
Centrifugal pump and engine with rope drive....	858.00
Plunger pump on river bank.....	100.00
Wash water pump for filters.....	227.19
Steam and exhaust piping system.....	1,600.00
Settling basins, 1,460,000 gallons capacity.....	11,800.00
Filters	8,500.00
Filtered water basin	2,000.00
Piping about plant—water and drain pipe.....	2,000.00

\$72,326.26

Add 15 per cent for plans, supervision and contingencies 10,848.94

83,175.20

Add value of pipe distribution system brought forward 101,944.00

Total estimated value to the City of Vicksburg Water Company's system. \$185,117.20

I have not gone into the matter of water meters. These may be estimated at \$18.00 each, installed, when new. Their life is frequently very short, and if five to eight years old they have probably depreciated 50 per cent.

The following is a statement of the pipe lines attached to the Vicksburg Water Works Company's system, which furnishes private fire protection, and are assumed to be in the nature of private services, therefore are not included in the foregoing estimate.

	6 in. Pipe Lineal Feet.	64 in.	Valves- Hydrants.
To All Saint's College	600		1
To furniture factory	800	1	5
To cotton yards (foot on [of] Speed Street)	2250	3	9
To Lower Compress (foot of Henry Street)	1650	3	9
To Upper Compress (Pearl St.)	500	2	2
To Henry Street, east from Pearl	200	1	1
A. & V. Passenger Depot.	900	1	2
Totals	6900	11	29

Estimate on above, made for convenience if its value is desired:

6900 feet 6- pipe at 70 cents.	\$4,830.00
11 6 in. valves at \$15.00.	165.00
29 hydrants at \$25.00.	725.00
	<hr/>
	\$5,720.00

Less depreciation according to years of service.

On pages 14 and 15 Mr. Dabney in discussing the method adopted by him in valuing the Vicksburg Water Works Company's plant, among other things, says:

180 "The water company has also a considerable extent of lines and fire hydrants to furnish special protection to factories, warehouses and railroad property, which are not shown on this map.

The new distribution system shown on this map has estimated 142,197 feet of cast iron pipe, or about 27 miles. I have not estimated the extent in the old system, but have carefully estimated the additions that I believe to be necessary to place it on an equal basis of efficiency with the new system. The lines to be added for this purpose are also shown on the map. In the nature of things this is an approximation, as the arrangements of the two systems has some considerable differences; but I believe that the additions proposed afford about the least expensive method of bringing the capacity of the old to that of the proposed new system.

The water company has, in a few localities, pipes in streets where either none at all, or smaller sizes, are shown for the new system. Unless balanced against deficiencies elsewhere, these are credited to the old system in the estimate of deficiencies below.

The city has built certain pipe lines parallel to lines in the old system, and a considerable extent of these lines has been adopted as essential in the augmenting of the old system. These lines are not included in either the foregoing or the following estimate. They have already been built and paid for by the city and will be used in either the new plant or in increasing the old plant, hence will not be an item in this comparison. When the new and old pipes lie side by side, the city would naturally use her own pipe, and not buy another, if both could not be used advantageously. It would follow that deduction should be made from any value determined upon for the old system for the pipes, situated as described, that cannot profitably be used. For a portion of these old pipes the capacity is counted upon and they should be paid for at full physical value. For the other portions, capacity will be added by their presence which, while not especially needed, will be

desirable, and it would not be adverse to the city's interest to pay in some measure for this capacity.

I have taken as a basis the old six-inch pipes, and have computed that the use of the former will add capacity of about 17 1/2 per cent of the capacity of the latter.

Estimating 12 inch lines at \$1.60 per foot, 17 1/2 per cent of this would be 28 cents per foot against 70 cents, the estimated full cost of new 6-inch pipe lines. The difference of 42 cents has been deducted for those lines under discussion, applying the same basis of value where 6-inch lines parallel 6-inch. This, in view of a slightly less use for the extra capacity afforded, is believed to be liberal."

On page 18 he further says:

"The pump and boiler house, formerly 42 1/2 feet x 92 feet inside, has been lengthened 26 feet on the north end to make room for the new pump. The south end should be extended twelve or fourteen feet and the old tubular boilers removed, to make room for a new water tube boiler, and a second when needed in the future. The partition wall between boiler and pump rooms would make a deficiency charge on insurance rates. It should be moved northward four feet so that holes will not have to be left for reaching the drums of the boiler, and it should be made a parapet wall with standard fire doors. * * *

In estimating this building, only salvage has been allowed on the south and middle walls. The remainder of the old part of the building has been charged 50 per cent depreciation. The new end of the building and concrete floor have been figured as new.

181	Estimated value to the city.....	\$3,500
* * *		

The pump pit in the engine room is too small to provide for sufficient capacity in low service pumping equipment. It would be hazardous to try to enlarge it within the building; besides, it occupies space that will at some time be needed for an additional high service pump. * * *

It is estimated that the present pit will have no value to the city after the sinking of a new one."

On page 22 he says of the brick stack:

"In installing a new boiler, a stack capacity for two boilers should be provided. The size of this stack is considered inadequate for this, and only its salvage value has been estimated as\$284.00

On the same page he says of the boilers:

"The two fire tube boilers should be removed and the same space occupied by a water tube boiler.

The fire tube boilers have been appraised at what they might sell for\$500.00

Under the head of Going Value (page 26) he says:

"It may be permissible also to touch upon the subject of 'going value' and 'franchise value.' These items are inseparable and depend upon the earning capacity of a plant; that is, upon its present and prospective profits. It seems fair to suppose that as soon as the city, having come into possession of a public utility, finds itself making a large profit at the expense of its citizens, it will so reduce the rates for service as to leave only a safe margin above operating and maintenance expense and fixed charges."

The pamphlet also contains a letter from the Mayor of Helena, Mont., to Mr. P. M. Harding, one of the members of the Board of Mayor and Aldermen.

This letter, among other things, contained the following:

"Dear Sir: Your letter of July 15th at hand. On June 26 the taxpayers of our city voted to purchase the property of the Helena Water Works Company for \$400,000. The property consists of about forty-five miles of distributing mains, some of which are less than four inches, and a small amount of ten and twelve inch, and the remaining sizes are four, six and eight inch, and of three sizes about one-half are four inch. The materials are screw joints, kalamein and cast iron. The water is supplied by gravity, and is conveyed in pipes of various sizes and materials and from various distances, and is brought into the city at four different levels. The

largest supply is brought in pipes ranging from sixteen inch down to twelve inch for a distance of eight miles.

In connection with the plant there is a pumping station, which is located at a well below the city. The well [well] has been condemned for sanitary reasons, but in the very low seasons is put into operation, and is in operation at the present time. The pumping plant consists of two Blake pumps with a capacity of a thousand gallons a minute, and the water is raised about one hundred feet.

The plant is a consolidation of four different plants, which, until January, 1890, was operated by four different water companies. At that time a twenty year franchise was
182 arranged, which franchise expired on January 15th, 1910. Since that time the water company has been operating without a franchise.

In 1895 the city voted to acquire a water plant and system, and proceeded upon the theory that a new water works plant and supply could be acquired and operated independently and regardless of the one in existence. The water company at that time offered its entire property for \$1,386,000, and being unable to secure that price, the company advocated and urged that the property be condemned and acquired under the eminent domain act of our State. This, of course, meant that the value would be fixed by disinterested and honest appraisers. In this the water company failed to accomplish their desired end. The city then proceeded to adopt plans and specifications and to acquire a water supply for an independent plant. This was followed by innumerable injunctions and legal skirmishes for a long period of years, and was only ended about four months ago, when the water company found that it was absolutely impossible for it to secure even a temporary restraining order in either the State or United States court. A few years ago, after the offer of \$1,386,000 was made, the company made a price of \$990,000, and in 1903 it offered its property for \$670,000, and two years ago an offer of \$590,000 was made. During these years the offers above referred to were practically ignored and efforts were constantly made to acquire an independent plant, and were only provided by actions which were pending in court.

Three years ago the city awarded a contract for the construction of a new plant, and sold the necessary bonds. This was followed by the issuance of an injunction, and our highest

court held that our procedure was irregular. Last January another election was held for the purpose of bonding the city for the sum of \$650,000, and was carried by a large affirmative vote. Following this election the council advertised for bids for the construction of a new plant, and also advertised for bonds for sale. Within a week of the time fixed for awarding contract and selling bonds, the water company presented an offer to sell its property for the sum of \$400,000. This proposition was voted upon and accepted on June 26th, and we are now advertising the bond sale. * * *

If your city is desirous of purchasing the existing plant at anything like a fair price, it is quite likely that it will be necessary for you to lay out plans and begin negotiations for a new and independent plant. In this way you will be able to ascertain the cost of a new plant, and in order to save itself, it will be necessary for the private company to meet the competitive price or bid."

The newspaper article, Exhibit "B," to Mr. Paxtons deposition, among other things, contained the following:

To the Citizens of Vicksburg:

Below the committee presents a few remarks bearing on the Vicksburg Water Works Company's Circular No. 2.

We beg you to remember—

That we are making this fight in YOUR behalf.

We have had every conceivable trouble with the management of the Vicksburg Water Works Company for years.

THESE TROUBLES HAVE BEEN YOURS.

We are trying to show you a **WAY OUT OF**
183 **THEM.**

We ask you to **REMEMBER** that the Vicksburg Water Works Company is fighting for the purpose of muddying the waters and didtorting [distorting] your minds with figures.

If this fight would continue a few months there would be enough omissions alone in Mr. Dabney's report to make their plant worth **TEN MILLION DOLLARS.**

Remember—We want to own a water works for the purpose of supplying water at **REASONABLE RATES**—not exorbitant [exorbitant] and prohibitory ones—as are being charged now and will be charged under the receivership.

Remember—We want you to own a water works free from **FEDERAL INJUNCTIONS**, free from a 'BOOK OF RULES.'

THESE and HUNDREDS of other benefits have led us to the conclusion that if you vote this **BOND ISSUE** we will end our water works troubles.

Remarks on Vicksburg Water Company's Circular No. 3.

It should be remembered in considering Mr. Dabney's report, with reference to the Vicksburg Water Company's plant, that he first made a plan and estimate of what the city **OUGHT TO HAVE**, if a system were built, and then considered the old system in comparison with this; that is, valued its several parts in accordance with their adaptability as parts of the new system. This was clearly stated in the report. From the city's viewpoint, it would be very poor business policy to pay full cost price, for something which is not adaptable, and then "patch out" with it, when we have the opportunity of getting an up to date system of water works fully equal to our needs, whether by building a new plant or by enlarging the old one, **BUT ONLY USING THOSE PARTS OF THE OLD PLANT THAT ARE ADAPTABLE**. No doubt A. M. Lockett & Co. who are a very reliable firm, can crowd the three pumps into a pit 13 feet in diameter; but if they were asked to recommend to a purchaser who was planning to build a pit the size that he should make it for these same pumps, it is most probable that they would recommend a considerably larger pit. It is exceedingly bad practice to crowd valuable machinery
 184 in a place that is difficult or uncomfortable of access, where it is almost sure not to have proper and frequent attention, and it will pay in the end if a pit be made which gives ample room for the attendants to work on the pumps. Even though it would be possible to use this pit, the recommendation that the city should build a larger one would seem to be based on good grounds." * * *

The witness Paxton also testified that he had charge of the city's registration book and that these books showed that 313 persons had been registered within four months preceeding the bond election, that of these 21 had been stricken from the list

as being disqualified, leaving 232 who voted at the bond election in question.

On cross-examination Mr. Paxton testified:

That Messrs. Stein, Havis, Harding and Hayes, whose names appeared in the newspaper article Exhibit "B," were members of the Board of Mayor and Aldermen of the City of Vicksburg, Hayes being the Mayor; that they constituted what is known as the "Water Works Committee" of said board, Stein being the chairman of the committee; that said committee was appointed by resolution, entered on the minutes of said board of May 15th, 1911, in words and figures as follows, to-wit:

"On motion of Aldermen [Alderman] Stein a committee was appointed to look into the advisability of completing the present system of water works as started by the city and look into the matter of issuing bonds to pay for the same, the committee to report at next meeting. Committee—Aldermen Stein, Harding, Havis."

That the pamphlet referred to as Exhibit "A" to the witness's testimony were mailed out to the voters of the City of Vicksburg, the city paying \$97.00 for the printing of the same and \$32.00, postage for mailing, which was included in the expenditures mentioned above.

That the city paid nothing for hacks or other vehicles to take the voters to the polls, nor employed
185 any one in any way, nor spent any other sum of money in and about the election except the necessary cost of holding the same and the items mentioned above and listed out.

The witness also testified that he found on page 237 of the same minute book another entry as follows:

"Attorneys R. L. McLaurin and Joe Hirsch appeared and addressed the board in behalf of a petition, said to contain the signatures of eleven hundred citizens of the City of Vicksburg, asking that there be submitted to the qualified voters of the city two propositions: First—To build a water works. Second—To buy the present water works. Aldermen [Alderman] Stein moved that the petition be referred to the Water Works Committee, city attorney and water works attorney of

the Board of Mayor and Aldermen; the motion coming up on an aye and nay vote, was adopted by the following vote: * * *.

That on page 240, same minute book, he found a further minute as follows:

"Mr. John C. Bryson, attorney for the Vicksburg Water Works Company, presented a supplemental petition to those presented at the last meeting; this petition said to contain two hundred and twenty-four additional names. On motion of Aldermen [Alderman] Harding, the petition was referred to the Special Water Works Committee, the city's water works attorneys and city attorney.

That on page 443 of the same minute book he found a further minute as follows:

"Aldermen [Alderman] Stein, chairman of the special committee, reported that his committee had the petition of the citizens and water consumers under consideration and would report at an early date."

That at the same meeting at which the above minute was made he found another minute upon the same page of the same book as follows:

186 "Alderman Havis moved that the city invite Mr. A. L. Dabney to come here and go over the plans as outlined by Mr. Fuller for a water works system, and that he make an estimate of the cost of same, and that an election be called for authority for the issuance of bonds to pay for the paving and the proposed water works. Alderman Miller offered an amendment, that Engineer A. L. Dabney, when he comes here, be requested to look over the plant of the Vicksburg Water Works Company, and that he present to the board an estimate of its value. The aye and nay vote being called for or the amendment, it was lost. * * * The vote being taken upon the original motion as offered by Alderman Havis, it was adopted."

This action took place at the meeting of the said board held on July 13th, 1911, and was approved at the meeting on July 17th.

The witness further testified that he did not remember any further report having been made by the Water Works Committee upon the citizens petition. He was asked to search the minutes and if he found a further report to file a copy of the same with his deposition. None appears to have been filed as shown by the stenographers notes.

That the next action of this committee, so far as appears upon the minutes of said board, is found on page 256 of the same minute book and is as follows:

"Alderman Stein, Chairman, Special Water Works Committee, reported that his committee would shortly make a full and complete report upon the value of the plant of the Vicksburg Water Works Company, also upon the approximate cost of the proposed water works."

That on page 259, same minute book, he found the following additional entry:

"John C. Bryson, attorney for the Vicksburg Water Works Company, presented and read a communication from his company calling attention to a request having been made to allow their expert to be present and work in connection with Mr.

A. L. Dabney in the appraisalment of their property; 187 he also stated that Mr. J. W. Alvord was now here making for them a valuation of their property. On motion of Alderman Harding the communication was received and ordered filed."

That the witness did not know of any action having been taken the said request at that meeting. The witness did not know of any further action ever having been taken.

That the said Water Works Committee made a report of the Board of Mayor and Aldermen on October 9th, 1911, as follows:

"We, your committee, appointed several months ago for the purpose of looking into the advisability of building a new water works system or purchasing the old, beg leave to report to you as follows:

"After having made repeated efforts to get from the Vicks-

burg Water Works Company a price for the existing plant, upon which we could ask this council to recommend to the people the purchasing thereof, and also attempting to buy the existing water works plant by arbitration, and after these efforts failed, we, by your direction, have gone into the plans for the building of a system with Mr. A. L. Dabney, an engineer of well known ability, having had his report in our hands for quite awhile and given each member of the board an opportunity to read the same, we have arrived at this conclusion; we recommend that the City Council call an election for a bond issue for a sufficient amount to construct a new, up to date, independent plant, sufficient for the needs of our growing city, municipally owned, and under the control of a water commission separate and distinct from the City Council in accordance with the plans and specifications of Mr. A. L. Dabney; not to be erected until the expiration of the franchise of the Vicksburg Water Works Company. * * *

This committee * * * have placed in the hands of the printers a copy of the entire report so that it can be put in
 188 such shape that the voters and water users of the City of Vicksburg can obtain a copy at their will without any cost.

We recommend that you give the authority to the committee to have two thousand of these pamphlets printed.

The committee does not desire to go into any extensive argument about the many features that are being presented to the Vicksburg public regarding either the purchase of the present system or the building of a new one, realizing that if this council adopts the recommendation of the committee we will have to lend every effort to the carrying of the bond issue, believing that the fair minded people of our city will support this movement, realizing that it is the best thing for all concerned.
 * * *

Alderman Harding moved that the report be received, and the recommendations of the committee be adopted. An 'aye' and 'nay' vote being called for, the motion was adopted.

Witness further said that he was present at the meeting of the said board at which the above report was made and adopted and heard the debate thereon, but could not say whether Alderman Harding, at this meeting, read a letter from the Mayor of Helena, Montana, but that he did remember that Alderman

Harding read such letter to the board at some time and quoted therefrom; that it was a similar case to ours.

That there appeared upon the same minute book, pp. 268-269, another report from the same committee addressed to the Mayor and Aldermen, which, among other things, contained and recommended the following:

* * *

We recommend that on Tuesday the twelfth day of December you call an election asking the people to vote a bond issue for \$50,000.00 for the purpose of building a high school for the City of Vicksburg. We further recommend that the Mayor call an election on Tuesday, January 23rd, asking the people to vote a bond issue for \$400,000.00 to build a water works and \$100,000.00 for street improvements. * * *

You are doubtless aware our present bonded indebtedness is \$789,000.00 and in order to be within ten per cent of our valuation, we would then have a margin of only \$272,000.00.

The Legislature in 1910, however, gives us the right to issue bonds up to fifteen per cent of our assessed valuation for water works and paving purposes only.

Therefore, you will readily see that in order to secure a high school for the City of Vicksburg without another act of the Legislature it would be necessary to call this election prior to our issuing any water works bonds at all."

This report was adopted as shown by the minutes of the same meeting. The minutes were duly approved at the next regular meeting.

The same minute book shows on page 275 the following order:

"On motion of Alderman Stein, a special committee on the bond issues were given authority to employ a stenographer in getting up data for presentation to the people."

On the same minute book, page 280, the following resolution appears:

"The following resolution offered by Alderman Montgomery relating to the issuance of bonds, was on motion adopted.

Whereas, it is manifest to the Mayor and Aldermen of the City of Vicksburg, Mississippi that there is an immediate necessity for the construction of a water works plant, or system in and for the City of Vicksburg:

Whereas, it is the intention and purpose of the Mayor and Aldermen of the City of Vicksburg as now expressed at the regular meeting thereof on the 6th day of November, 1911, as shown by its minutes to that effect, to issue bonds of the City of Vicksburg, to the amount of \$400,000.00 or so much thereof as may be necessary for the purpose of constructing in and for the City of Vicksburg, Mississippi, a water works plant, or system for the use of said city, and its citizens, from 190 and after the end of five years from November, 19th, 1911, said bonds to be issued in accordance with the requirements and provisions of the charter of the City of Vicksburg and the amendments thereof, and especially the amendment to said charter, approved by the Governor of Mississippi on the 3rd day of June, 1905, and the amendment approved by the Governor of Mississippi on the 11th day of December, 1911,

And whereas, the amount of said bond to be issued when added to the amount of all outstanding bonds of said city and the amount of all bonds authorized to be issued by the Mayor and Aldermen of said city, but which have not been actually issued by said Mayor and Aldermen will exceed seven per centum of the assessed value of the taxable property of the City of Vicksburg, but will not exceed fifteen per centum of the said assessed value, and the issuance thereof must, therefore, be authorized to two-thirds of the qualified electors of said city voting at an election held for that purpose.

It is therefore resolved, first, that an election is hereby ordered to be held on the 23rd day of January, 1912, at which election there shall be submitted to the qualified electors of the City of Vicksburg the question of whether or not they will vote to authorize the Mayor and Aldermen of the City of Vicksburg to issue bonds of the city in the sum of \$400,000.00, or so much thereof as may be necessary for the purpose of constructing in and for the City of Vicksburg, Mississippi, a water works plant, or system, as hereinbefore indicated.

On page 3 of minute book K, being the minute book succeeding that from which the foregoing orders, resolutions and decrees appear, an ordinance date Jan'y 1st, 1912, is recorded, setting up and stating the fact that a mistake had been made in the publication of the notice calling the bond election for January 23rd, therefore setting aside the former ordinance in reference thereto and adopting a new ordinance in the same words and figures, except name and date of election
 191 as February 14th, 1912, instead of Jan'y 23, 1912, the two ordinances being otherwise exactly the same.

The witness Paxton further testified that on page 17 of the said Minute Book K of the Mayor and Aldermen of the City of Vicksburg as of date Feb'y 15th, he found the following order:

"Honorable Mayor and Aldermen of the City of Vicksburg:

We, the undersigned election commissioners, duly appointed by your honorable body to conduct a certain election, provided and ordered by that resolution adopted by your honorable body January 1, 1912, by which resolution it was ordered that a special election be held on the 14th day of February, 1912, in and for the said City of Vicksburg, for the purpose of submitting to the qualified electors of the City of Vicksburg, Mississippi, the question of whether or not they will vote for the issuance of the bonds of said city in the sum of \$400,000.00, or as much thereof as may be necessary, for the purpose of constructing in and for the City of Vicksburg, Mississippi, a water works plant or system for the use of said city and the general public from and after the end of five years from November 19th, 1911.

Be it leave to report to your honorable body, that we gave notice of the holding of said election, as provided by law and said resolution, by inserting notices in the Vicksburg Daily Herald and the Vicksburg Evening Post for four weeks prior to said election. Proofs of publication, showing said insertion of said notices and the form thereof, are herewith filed and numbered Exhibits "A" and "B" to this report.

That we proceeded as required by law to revise and correct the list of qualified voters eligible to vote in said election.

We further proceeded to have ballots printed and score sheets in due form, as provided by said resolution and required by law.

We appointed judges, clerks and bailiffs requisite and necessary for holding said election in the respective wards.

That we have duly and lawfully canvassed the returns of said election as made by the said officers, and we find that said election has been duly, lawfully and properly conducted, and that the following are the election returns thereof, showing the legal votes cast at said election, and in what manner they are cast, to-wit:

First Ward.

For the issuance of bonds	236
Against the issuance of bonds	16

Second Ward.

For the issuance of bonds	233
Against the issuance of bonds	21

Third Ward.

For the issuance of bonds.....	287
Against the issuance of bonds	44

Fourth Ward.

For the issuance of bonds	201
Against the issuance of bonds	30

Fifth Ward.

For the issuance of bonds	134
Against the issuance of bonds	54

The total number of votes cast for the issuance of bonds is 1091; the total number of votes cast against the issuance of bonds is 167.

We respectfully submit that the election is valid inasmuch as the above legal returns show that more than two-thirds of the qualified electors, voting at said election, have voted in favor of the issuance of bonds.

We return herewith attached and made Exhibit "D" to this

report the list of officers holding said election, with the amount due each one of them set opposite his name.

Respectfully submitted,

T. G. BIRCHETT,

A. L. FISCHER,

VICTOR O'CONNOR,

Election Commissioners.

195 That following this on page 23 of the same minute book appears an ordinance ratifying and approving the report of the election commissioners declaring the election carried for the issue of the water works bonds, etc., the preamble of which ordinance is in words and figures as follows, to-wit:

"An ordinance declaring the election for the issuance of bonds for the purpose of constructing, in and for the City of Vicksburg, Mississippi, a water works plant or system, carried for the issuance of said bonds was read, and under suspension of the rules was read a second and third time by its title, and on the third time was adopted." The closing paragraph of the said ordinance being in words and figures as follows, to-wit:

"That the election for the purpose of ascertaining the sense of the qualified electors of said city, upon the question of issuing the bonds of said city for constructing in and for the said city and the public generally a 'Water Works Plant or System,' said bonds not to exceed the sum of \$400,000.00, was carried in favor of the issue of said bonds.

2. That this ordinance take effect and be in force from and after its passage.

Ordained this 19th day of February, 1912."

Witness PAXTON also testified that the poll books in his office, which had been used in holding the said bond election on Feb'y 14th, 1912, show the persons who voted at said election; that he has counted and listed the same; that 1073 persons who were qualified to vote, voted in said election as shown by the said books and the list made out by him therefrom.

L. P. CASHMAN testified in substance as follows:

That he was a citizen and resident of the City of Vicksburg, Mississippi, and was engaged in the newspaper business, being business manager of the Vicksburg Evening Post, a daily newspaper published in said city, with a circulation of about fifteen or sixteen hundred; that said newspaper had in December,

1911, and January, 1912, published certain articles at the instance and request of Mr. Ben. H. Stein, a member of the Board of Mayor and Aldermen of said City of Vicksburg, the said article being signed by Ben H. Stein, H. H. Havis, P. M. Harding and J. J. Hayes, the said Hayes being the Mayor of said city, and the others being members of the Board of Mayor and Aldermen; that at the instance of the said Stein the articles were charged as advertisements to the "City of Vicksburg Water Works Committee, Ben Stein, Chairman," with the understanding that they should be paid for by the City of Vicksburg. As a matter of fact, however, they were never paid for, but were presented several times for payment and on each occasion Mr. Stein would have them deferred on the ground that the city had no funds with which to pay the same.

The third article published on January 19th, 1912, among other things in substance contained the following:

"The persistent efforts manifested by the Vicksburg Water Works Company from the beginning, and particularly exemplified in its last two publications, to distort the true issue presented in the water works bond election, makes it proper that the city's position should be briefly explained.

The Water Works Company endeavors to have it appear that the city is unwilling to buy its plant, and is seeking authority from the people to build a plant of its own for the purpose of revenging itself upon the Water Works Company and reducing its water works plant to what it so pathetically and tearfully calls a 'Junk Pile.' So far from being the case, there is not, we believe, a single member of the Board of Mayor and Aldermen who does not fully recognize the desirability of purchasing the present plant, and who is not willing at any time to vote to do so, provided it can be had for a reasonable price. In face [fact] more than a year was wasted in futile attempts to purchase at a fair price, and it was only

after Mr. Crumpler had repeatedly announced in public and in private, to members of the Board of Aldermen, their attorneys, and others interested in the matter, that he would not reduce his price of \$400,000.00 under any circumstances that the city finally abandoned all thought of purchasing the present water works plant.

That the city had employed Mr. A. L. Dabney, a civil engineer, to prepare plans for a new plant and to value the existing plant; that Mr. Dabney called in the assistance of another engineer, and after inspecting the property, finally reported the value to be \$185,000.00; that a new plant superior in every way could be built for \$340,000.00. If the people should authorize the issuance of the bonds, the Water Works Company will even then have an opportunity to offer to the city its system of water works at a reasonable price and it will undoubtedly be purchased if this shall be done.

The people should understand that even if the bond issue shall be authorized the Mayor and Aldermen need not issue the bonds if the Water Works Company will offer to sell at a reasonable price, but can call another election to authorize bonds for the purchase of the present plant.

It is our firm belief that if the bonds shall be voted for the construction of a new plant, it will before the contract is signed, offer its system at a reasonable price. This belief is what Mr. Crumpler has in a recent article referred to as the 'City's Bluff.' It is not intended as a bluff, but is founded simply upon the conviction that even Mr. Crumpler will not convert his plant into a 'junk pile' rather than sell at a reasonable price."

This article is signed Ben H. Stein, Chairman.

This witness further testified in substance:

That Ben H. Stein, a member of the Board of Mayor and Aldermen of the City of Vicksburg, Mississippi, in a conversation had with witness and witness's father, had said they were going to try to pass the bond issue to be used as a kind of big stick to hold over the water works, and didn't really intend the water works to be built.

On cross-examination he testified that the amount charged

the city for the three bills in question was \$86.00, and that these were the only articles published in the Post; that he knew of no coercion or corruption in the bond election.

E. A. FITZGERALD, a witness for complainant, testified in substance: That he was the business manager of the Vicksburg Herald, a newspaper published in the City of Vicksburg, Mississippi, having a circulation in said city of from 1200 to 1400; that his paper on December 31st, 1911, published an article signed Ben H. Stein, Chairman, H. H. Havis, P. M. Harding and J. J. Hayes, being the same article published in the Vicksburg Evening Post of the next day, which article is set forth in the deposition of A. M. Paxton; that there was also published in his paper an article signed by the same parties on the 19th day of January, 1912, being the last of the articles published in the Vicksburg Evening Post, as testified to by L. P. Cashman and abstracted as part of his testimony.

That these articles were charged as advertisements against the City of Vicksburg.

Mr. Fitzgerald on cross-examination testified that the bond election was a heated one; that many articles for both sides were published in the newspapers; that the Water Works Company itself published a number of the articles.

CHAS. E. WRIGHT testified:

That he was city editor of the Vicksburg Herald; that he was present at all, or nearly all, of the meetings of the Board of Mayor and Aldermen, but he could not remember the debate on the Helena letter nor what was said by Aldermen Harding and Stein in reference to its bearing on the election in Vicksburg; that he did not recall whether he wrote the article reporting such debate or not.

On cross-examination he testified:

That he never heard that there was an unfairness in the election until the bond election suit was filed and that he did not know on [of] any unfairness in the election.

197 Mr. JNO. G. CASHMAN, a witness for the complainant, testified in substance:

That he was editor and one of the publishers of the Vicksburg Evening Post, a newspaper published in the City of Vicksburg, with a circulation of about fifteen hundred; that he remembered the publication of three articles signed Ben H. Stein, Chairman, H. H. Havis, P. M. Harding and J. J. Hayes; that these articles appeared on or about Dec. 17th, 1911, January ——— and January 23, 1912; that these articles were published at the instance of Mr. Ben H. Stein, Chairman of the Water Works Committee from the Board of Mayor and Aldermen of the City of Vicksburg; that Mr. Stein requested first, that the articles ought to be published free; that his son, the business manager of the paper, suggested that they were advertisements in which the witness agreed and it was finally concluded that the articles should be paid for as advertisements, and "that Mr. Stein as chairman of the committee, and a member of the Board of Mayor and Aldermen would see to it that the bills were allowed by the Board of Mayor and Aldermen."

The articles referred to appear in the record, two of them in the testimony of L. P. Cashman, and one in the testimony of A. M. Paxton:

On cross-examination Mr. Cashman testified:

That he did not know Mr. Stein had authority from the Board of Mayor and Aldermen to publish the articles or not, nor did he know whether there was any reference to the same upon the minutes of the board of Mayor and Aldermen; that he is under the impression the bill had been presented but that it had not been paid; that a number of city bills contracted for since the said articles in question had been paid for.

An agreement was also had as to the testimony of JNO. W. ALVORD:

198 This agreement recites in substance that Jno. W. Alvord is a citizen and resident of the City of Chicago, Illinois, and that he graduated in civil engineering at Harvard University, and has since been continuously engaged, for about thirty-three years, in hydraulic engineering, during which time he has planned and supervised the construction of a number of system of water works and for the last fourteen years has been largely employed in appraising and valuing such plants; that during this time he has appraised and valued forty-two different plants, among which may be mentioned Omaha, Neb., Knoxville, Tenn., Macon, Ga., Vicksburg, Miss., etc.

That at one time during the year of 1911, when the City of Vicksburg and the Water Works Company were about to agree on a sale of the property of the Water Works Company to the City of Vicksburg by appraisement by three disinterested hydraulic engineers, the city's representatives applied to him to act for and on behalf of the city in making such appraisement; that when the scheme to sell by appraisement failed he was afterwards, during the same year, employed by W. A. Henson, receiver (complainant in the above entitled cause) to inventory and value the Vicksburg plant, which he accordingly did, as of Nov. 19th, 1911, and reported his findings to the said receiver. That the said report so made by him was to the best of his knowledge and belief true and correct as made, and truly and correctly valued each item of the said plant and gave the aggregate of such items as a whole.

That for the purpose of making such valuation he visited the City of Vicksburg and made an extended examination of the said plant and personally verified an inventory of the said properties which he had previously caused to be made by an employ from his office in order to determine the present fair value of the said water works system; that from data thus gathered by him and his assistants, and verified by him, he estimated the cost of reproducing the plant under then existing conditions and the then existing normal cost of material and labor at \$444,299.00,

199 That he also estimated the value of the said property from the viewpoint commonly designated as

the 'Commercial' or 'Comparative' method, such as a prudent business man considering the property as an investment, being without skilled knowledge of the cost of construction, but familiar with the cost of plants similarly conditioned elsewhere throughout the country and found according to his method the value to be \$450,000.00.

That in view of the results reached by these two methods of valuation he considers the physical properties of the plant considered as a unit and as a going concern reasonably worth \$445,000.00.

That he also considered the franchise owned by the company known as the 'Bullock Franchise,' under which the said plant is being operated and has a right to continue to operate up to the 19th day of November, 1916, to be reasonably worth \$174,219.00 as of date Nov. 19th, 1911, making a total valuation of the said properties on said date \$618,518.00, a detailed summary of which is hereto attached, marked Exhibit "A," and made a part of this deposition.

That the witness would further testify in reference to the value of the property that he considers the reproduction method of estimating the value of the plant as being most applicable, and that the other method was used by him only as a check upon the result found by the reproduction method.

That in estimating the reproduction value of the property the witness found it necessary to consider both depreciation and appreciation.

That as to appreciation he considers that the real estate is more valuable than when originally purchased; that he also considers that the fact of the streets being paved over lines of water mains has enhanced their value because of the fact to lay water mains under such streets would necessitate cutting thru the pavement to lay them and repairing the pavement after the same were laid.

That as to depreciation he considers it under three heads:

Ordinary, functional and contingent.

Ordinary depreciation occurs by reason of ordinary wear and tear of the machinery, apparatus, appliances and properties generally as they exist in the plant, and that it progresses thru the life of each individual part of the plant being less rapid at the beginning and gradually increasing, depending

largely upon the nature of the service to which each particular part is subjected.

Under functional depreciation he estimates the decrease in value of structure and apparatus occasioned by reason of their failure to adequately fulfill the requirements for which they were intended, due to obsolescence from changed conditions, or from a change in the art, or from any or various reasons which may make the structure or apparatus less suitable or efficient for the service which it is called upon to provide.

This form of depreciation is found in machinery which tho adequate for the demands made upon it when installed by reason of increased service or the construction of machinery better suited to perform the work has outlived its utility, altho the physical structure of the machine may be as good as new.

Contingent depreciation covers extraordinary and unforeseen expenses and accidents, and cannot be estimated except in the most general way and need not be considered in estimating the value of the existing plant.

That as to depreciation in the present plant he has carefully considered it and made proper allowance for it, as shown by the tabulated statement hereto attached as Exhibit "B."

It is further agreed that this witness would testify in reference to the probability and danger of the pumping plant of the complainant's water system caving into the river, that
 201 the protection of the river bank from washing away
 has been systematically undertaken by the company,
 and to such effect that the bank has remained stationary for the last ten years and appears in no further danger of destruction.

That his study of the Vicksburg plant indicates that it is well designed in all its parts, and has been so built that further extension and enlargement will but slightly effect the values of the existing structures. This fact enables the plant to give first-class service, and lessens the probability of losses from the necessary replacement of structures due to inadequacy or other causes included in the contingent depreciation. The plant is well provided against emergencies, and except for a few minor faults which have been reckoned with in estimating the depreciation, it is capable of giving first-class service for many years to come. This condition would tend to enhance the value of the present plant as the mistakes so liable to

occur in the construction of new plants, have been rectified, and future expense from these causes has been eliminated.

That the witness in making said report reached this conclusion quite independent of the views of those connected with the Water Company and that it was his aim to reach a conclusion that would not be in the least different were he reporting to the city instead of the Water Company.

That he herewith files a copy of his said report above referred to as an exhibit to this his deposition and has marked the same Exhibit "B" hereto.

Without at all conceding its relevancy, but on the contrary, protesting that it is utterly and wholly irrelevant, impertinent and incompetent, and without at all conceding that the witness has any personal knowledge of many of the things set forth but on the contrary protesting that from the nature of things he has not we agree that if called as a witness he would swear to the matters and things set forth above and that the said statement may be used and read as a deposition by
262 complainant in this cause.

(Signed) GEORGE ANDERSON,

(Signed) JOHN BRUNINI,

(Signed) O. W. CATCHINGS,

Sols. for Dfnt.

It further appears on page 35 of Mr. Alvord's report that he estimated it would take approximately two years to construct a system of water works in the City of Vicksburg.

TABULATED STATEMENT WATER DEPRECIATION AND VALUE, VICKSBURG, MISSISSIPPI, BY JOHN W. ALVORD,

Items	Repro- duction Cost	Date of Con- struction	Estimated Life in Years	Interest Rate	Annual Depreciation Amount in \$	Total Depreciation Age in Years	Depreciation Factor %	Amount	Net Physical Value
(1) Preliminary Development cost.	\$4,000							\$	\$ 4,000
(2) Real-estate.	16,970							2 90	16,680
(3) Cost iron pipe and specials.	80,947			2 1/2	23	18	5 0	4,047 00	76,900
(4) Valves and valve boxes.	3,432			3	89	18	21 0	721 00	2,711
(5) Fire Hydrants and public foun- tains.	6,430			3	89	18	21 0	1,350 00	5,080
(6) Laying street meters.	32,820			2 1/2	23	18	5 0	1,641 00	31,179
(7) Pavements over mains.	26,188			2 1/2	23	18	5 0	1,309 00	24,879
(8) Difficult construction.	3,229			2 1/2	23	18	5 0	161 00	3,059
(9) Service connections									
(a) Cast iron.	1,292			2 3/4	42	9	4 2	54 00	1,238
(b) Lead pipe.	18,579			3 3/4	89	9	9 0	672 00	16,907
(c) Galvanized Iron.	9,138			3 1/2	2 59	9	27 0	468 00	6,670
(d) Under pavements.	7,826			3	1 08	9	11 0	861 00	6,965
(10) Meters, Meter boxes and vaults.	3,017			3 1/2	2 57	4	11 0	332 00	2,685
(11) Stand-pipe.	13,620			3	89	23	29 0	530 00	11,090
Total for distribution system.	208,509				1,123 78	1		19,146 00	189,263
(12) The station buildings.	13,506			2 3/4	42	18	90 6	1,297 00	12,209
(13) Pumping shaft and tunnel.	11,639			2 3/4	42	23	13 0	1,513 00	10,126
(14) Brick stack.	4,166			3 1/2	1 58	12	23 0	958 00	3,208
(15) Steel stack.	1,022			3 1/2	26 26	2	5 0	51 00	971
(16) The Sterling boilers.	8,847			2 02	17 70	2	4 0	354 00	8,493
(17) Return Tubular boilers.	3,432			3 3/4	121 51	10	41 0	1,407 00	2,025
(18) Boiler accessories.	1,246			3 1/2	44 10	1	3 54	44 00	1,202
(19) Low Lift pumps.	3,774			3 1/4	2 02	8	18 0	679 00	3,095
(20) Emergency River side pump- ing plant.	2,377			3 1/2	3 54	10	41 0	975 00	1,402
(21) Snow high duty pumping eng.	21,865			3 1/4	1 58	00	00 0	000 00	21,865
(22) Deane's pumping engines.	13,470			3 1/4	1 58	23	53 0	7,139 00	6,331

[illegible]

204

An agreement between counsel was read as and for the deposition of Abe Kiersky, City Assessor and Collector of Taxes, and A. M. Paxton, City Clerk, to the effect that the said Paxton had made a list of the qualified voters who had registered more than four months preceeding the bond election in question and had voted at the said election; that the said Kiersky had compared the said list with the city assessment rolls and found that 418 of the persons named in the said list were taxpayers in the City of Vicksburg.

Mr. M. O. CRUMPLER, a witness on behalf of complainant, testified in substance:

That he was now acting as assistant to the receiver of the Vicksburg Water Works Company; that before the appointment of a receiver he was the manager of that company; that he was also a stockholder.

That he was cognizant of the various controversies between the city and the Water Company and was reasonably familiar with all that had taken place between the parties; that he had helped the Water Works Company in divers efforts by and between that company and the City of Vicksburg to sell the property to the City of Vicksburg by arbitration; that the first step looking to arbitration was made by Mr. Geo. W. Fuller of New York City, who at the time was representing the City of Vicksburg in preparing plans and specifications for a new plant. On one of his visits to Vicksburg he suggested to witness that the parties ought to get together, if possible, have the property appraised and let the city buy it instead of building a plant of its own; that he considered such course to be to the best interest of both parties; that he had urged the City's Council to the same effect and requested ~~ex~~ witness whether, or not, his company would be adverse to selling to the city by arbitration at that time instead of waiting till the end of the franchise. Witness indicated his willingness to consider such proposition and thereafter a meeting was arranged and held, Mr. Fuller, J. J. Hayes,

205

Mayor, John Brunini, attorney, and Mr. Twiss, engineer, representing the City of Vicksburg, and witness and J. C. Bryson, attorney, as representative of the Water Company. At this meeting Mr. Fuller drew up in his hand-

writing what he considered would be a fair proposition on both sides, and Mr. Brunini after reading the same, added the following, "To be binding on both sides." The whole agreement as modified by Mr. Brunini being in words and figures as follows:

"It is stipulated subject to ratification on each side that at as early a date as convenient there shall be appraised under the terms and conditions set forth in Section 9 of the original contract, all the property of the V. W. Co., existing or under construction at the time of the appraisal, and in addition thereto the current worth at the time of appraisal of the net earnings of the V. W. Co., adjusted in a fair and reasonable manner for the period between the time of appraisal and the termination of the present contract.

To be binding on both parties."

That the city declined to go further with this proposition to arbitrate, but on March 6th, following, passed a resolution looking to the same end, in words and figures as follows, to-wit:

Resolved, by the Mayor and Aldermen of the City of Vicksburg as follows:

First. That it is willing to purchase the property other than the book accounts, notes and other accounts receivable of the Vicksburg Water Works Company by arbitration.

Second. That the three arbitrators shall be three practicing lawyers of the State of Mississippi, of known high standing in their profession.

Third. That they shall be agreed upon by the parties in interest; that is to say, the Mayor and Aldermen of the City of Vicksburg, and the Vicksburg Water Works Company. That should an agreement, for any reason, be not made agreeable to both parties, then, Hon. H. C. Niles, our United States

District Judge, shall select as many of the arbitrators
206 as may not be agreed upon by said parties.

Fourth. That in determining the amount to be paid by the Mayor and Aldermen of the City of Vicksburg to the said

Vicksburg Water Works Company for the property of said company, exclusive of its book accounts, notes and other accounts receivable, said arbitrators, first.

(a) Shall fix the true present worth of the value of the physical property of the Vicksburg Water Company, considered as a going plant.

(b) Shall in fixing said sum, allow nothing for future earnings nor franchise value.

(c) Shall not consider any mains or other property of the Vicksburg Water Company which could not be utilized, or would be valueless in a well devised reconstructed system ample for the present and immediate growing needs of the said City of Vicksburg.

(d) Shall not consider as an element of value, or as an evidence of the value of said property of said company, the amount of outstanding bonds of the company, or second:

(a) Shall disregard the above method of fixing the amount of their award.

(b) Shall fix the true present value of the net earnings of the Vicksburg Water Works Company from — day of —, 1911, to 19th day of November, 1916.

(c) Shall allow in addition, the true present market value of the mains and other physical property of the company, as if the franchise had expired, and without right to further operate its said plant.

(d) Shall not consider as an element of value; or as an evidence of the value of said property of said company, the amount of the outstanding bonds of the company.

Fifth. Should the Vicksburg Water Works Company signify its consent to an arbitration upon the terms above indicated, all matters of procedure and detail shall be formally agreed upon in writing, and incorporated in a formal resolution which shall be submitted to the voters of the City

207 of Vicksburg for their ratification and approval before the arbitration is entered upon.

The Water Company filed a written objection to the proposition contained in this resolution, the main contention set up by the Water Company being as follows:

"The next sub-paragraph (b) provides, among other things, that the arbitrators in fixing the value of the properties, shall "allow" nothing for future earnings nor franchise value."

"This, we think, fails to harmonize with your first paragraph, which among other things provides that the city is willing to purchase the property, other than the book accounts, notes and other accounts receivable of the Vicksburg Water Works Company.

The Water Company's franchise is property, in fact one of its most valuable properties, yet it is not included in the 'book accounts' or 'notes' or 'other accounts receivable.'

Taken literally, the proposition is to purchase the Water Company's franchise, but to exclude the same from valuation, to take it but not pay for it. This would be confiscation, and certainly such could not have been the true intent of your proposition. The Water Company cannot reasonably be expected to accept this limitation as it now stands, as that would be taking property without just and due compensation.

The following paragraph (c) provides among other things that the arbitrators: 'Shall not consider the mains or other property which could not be utilized, or would be valueless in a well devised, reconstructed system ample for the present and immediate growing needs of the said City of Vicksburg.

This limitation likewise fails to harmonize with your first paragraph, wherein the city offers to purchase the property of the company other than [than] its 'book accounts, etc.' The idea of purchase presumes payment of value, yet, if taken literally, you ask the Water Company to except from valuation entirely all of such parts and parcels of its property as might be conceived to be 'valueless' in some imaginary plant which could be planned materially different from the present so as to dispense with many of the parts of the present system.

208

No two engineers if they were called would make the same

185

plans for a system of water works in Vicksburg or any other city. They would differ materially in their ideas and designs, and even after a plan had been adopted and working details drawn, and the construction was actually progressing, an engineer would make changes in his own plans, from time to time, as the work progressed and even then he would see, after the completion of the works where he had made some, perhaps many mistakes. There is nothing perfect.

It is the existing system which the city offers to purchase, hence it is the existing system which should be valued and every part of the plant, appliances and equipment which has value in the present system should be submitted to the arbitrators to fix the value upon the same as a part and parcel of the present system as now constructed at the cost of reproduction less actual depreciation.

The Water Company is entitled to full, fair and just compensation for all values to which it parts with and the arbitrators should be left free to assess such."

It among other things provides that the

"Arbitrators shall allow in addition, the true present market value of the mains and other physical property of the company, as if the franchise had expired and without right to further operate its said plant.

It would be very foolish indeed for the Water Company to agree that its physical properties shall now be valued on the hypothesis that its franchise is at an end when, as a matter of fact, the franchise has nearly six years yet to run.

If the franchise were at an end the Water Company would have no right to use the public streets for distributing water, and without this its physical properties might be considered as practically worthless or as having no value as junk, in which case they would be in effect a gift to the city, or

209 property taken with due and just compensation.

Surely the city cannot be serious in making such a proposition.

In addition it does not include what is known as the 'going value' of the plant. This is likewise excluding property of value from the arbitrators, and therefore would limit them to a valuation of what a learned Judge of the United States Supreme Court has recently termed 'the value of the

bare bones of the plant, its physical properties,' which the court held would not be permitted.

Your first offer is to pay for only such parts or parcels of the physical properties as could not be dispensed with in some imaginary 'well devised reconstructed system,' and this only upon the condition that the Water Company will surrender its franchise absolutely free of cost or price to the city, and your "second" is to pay the present worth of the prospective net earnings provided the Water Company will absolutely surrender the 'going value' of its plant for nothing and will also consent that its physical properties be valued as though the Water Company had no right to operate the plant, which might be considered as a junk value only. The city offers to purchase all the property except 'book accounts, etc.' but not to pay for all or to allow all to be valued by the arbitrators. The Water Company insists that none of the property shall be excluded from valuation, but on the other hand that all the property rights of every kind and description, including the physical property, the going value of the plant, and its franchise * * * shall be submitted to the arbitrators for valuation and shall be paid for by the city. All it wants or expects is full, fair and just compensation for all the values surrendered by it, as of the date of arbitration; less than this would be a taking of its property without 'due compensation,' which the law of the land prohibits."

If the city does not consider this fair to it then the Water Company is willing to enter into an agreement with the city to leave the question of what shall be submitted to the arbitrators for valuation, and what not, to the Hon. H. C. Niles, Judge, etc., for his determination.

216 The Water Company has preferred and still prefers to have the value of its property fixed by hydraulic engineers, as it considers them better qualified to fix values fair, just and equitable to both sides than men of other professions, and at less expense to both parties, but out of deference to the wishes of your Honorable Body it has given up this preference and now consents that the value of its properties may be fixed by lawyers within the bounds and suggestions named above."

The city's reply to the Water Company, contained among other things the following:

"We do not consider it necessary to answer the communication in so far as it consists of a captious and hypocritical quarrel with the mere verbiage of the city's proposition, nor will we refer to the objections raised specifically to what are denominated as its various 'paragraphs' and 'sub-paragraphs.'"

In brief the demand of the Water Works Company is that it be allowed the full value of its physical properties, treated as a going concern, and in addition to this the full value of the unexpired portion of its franchise, or, in other words, the amount of its estimated earnings for the next five years.

It is manifest, we think, that in no view of the matter is the Water Works Company entitled both to the value of its plant as a going concern and to its anticipated earnings, because the two cannot exist together as elements of value, but on the contrary, the enjoyment of one necessarily precludes that of the other.

* * * * *

To the foregoing the Water Company replied in a long circular citing a great number of authorities showing that it was entitled to pay for both its physical properties and its franchise. The article is too long to set out in full.

211 Witness further testified that in the last of these conferences looking to an arbitration between the parties, the Water Works Company, represented by Mr. J. C. Bryson and Messrs. Hirsch, Dent & Landau, of Vicksburg, Mississippi, and Mr. J. B. Sizer of Chattanooga, Tenn., nothing came of any the efforts to arbitrate.

212 The receiver, the complainant in this case, is a taxpayer of the City of Vicksburg on all the property owned by the Vicksburg Water Works Company under the franchise, the value of the same is limited to \$50,000 during the franchise period or up to November 18th, 1916, after that the property will be assessed as other property.

In order to get the valuation limited to \$50,000 the Water Company agreed, as shown by said franchise, to furnish free water to the public schools, all the public buildings, including the city hall, engine houses and to flush certain storm sewers and supply a number of drinking fountains and the city hos-

pital, all of which increases as the city grows, so that the Water Company and its receiver will be very glad if relieved of furnishing the free water and be taxed as other property. That on one occasion it offered to surrender its right to be limited to a \$50,000.00 valuation, provided it could be relieved of furnishing the free water. This the city declined to accept.

That the property of the Vicksburg Water Works Company has been inventoried and valued by three different persons within the last several years. The Water Company through its officers and agents, made an inventory and valuation of its own property, next it was valued by Mr. A. L. Dabney, civil engineer, who was employed by the Mayor and Aldermen of the City of Vicksburg, and lastly, it was valued by Mr. John W. Alvord, civil and hydraulic engineer of Chicago, Illinois, who was employed by complainant. Mr. Dabney's valuation was made just prior to the bond election in question and was published and put before the people during the canvass.

Witness compared the three valuations, item by item, and has tabulated the same so as to clearly show wherein they differ. This tabulation being as follows:

	Water Company's Value to the City.		Dabney's Value to the City.		Alvord's Value to the City.	
	Reproduction	Net	Reproduction	Net	Reproduction	Net
Preliminary Development cost.....	\$ 10,000	\$ 9,200		nothing	\$ 4,000	\$ 4,000
Real-estate.....	16,500	15,180	\$ 9,000	\$	16,970	16,680
Mains, valves and hydrants.....	148,919	139,000	110,809	88,647	149,817	140,749
Difficult construction.....			nothing	nothing	3,220	3,059
Service connections.....	11,008	37,728	nothing	nothing	36,835	31,780
Meters, Meter boxes and vaults.....	6,000	5,520	nothing	nothing	3,017	2,685
Stand pipe.....	17,000	15,640	nothing	nothing	15,620	11,090
The station building.....	13,500	12,420	don't state	3,500	13,500	12,209
Pumping shaft and tunnel.....	24,300	22,056	don't state	2,700	11,639	10,126
Brick smoke stack.....	2,300	2,116	1,533 (Salvage)	284	4,166	3,208
Steele Stack, Sterling Boilers, Automatic stokers, heater and boiler feed pump.....	9,450	8,694	9,251	7,515	9,869	9,464
Return Tubular boilers.....	3,000	2,760	2,438 (salvage)	500	3,432	2,025
Low Lift Centrifugal pump.....	2,500	2,300	1,530	858	3,774	3,095
Emergency River Pumping plant.....	2,000	1,840	500	100	2,337	1,402
Snow high duty pumping engine.....	21,255	19,537	19,325	18,775	21,865	21,865
Deane Pumping engines.....	13,565	12,480	7,600	3,967	13,470	6,331
Miscellaneous, out-buildings at pumping station, Ground improvements.....			nothing	nothing	197	75
Bank protection at station.....			nothing	nothing	468	356
Filter plant and settling basins.....	55,000	50,000	nothing	nothing	1,386	1,234
Filter wash pump and misc. piping.....	4,450	4,094	25,500	22,300	49,662	39,303
Steam piping, boiler accessories.....	2,000	1,840	2,426	2,227	3,828	2,946
Engineering, superintendence, administration, con- tingent, etc.....			1,928	1,600	1,246	1,202
Interest during construction.....	61,671	59,498	24,145	24,145	40,250	35,650
Going concern value.....	55,000	32,200	nothing	nothing	18,800	16,500
	145,000	145,000	nothing	nothing	67,265	67,265
Total cost of reproduction to City.....	\$637,398	\$600,063	\$215,985	\$496,677		\$444,299
Franchise value.....		\$600,043	nothing	nothing		174,219
Total net value to City.....		\$600,043	\$185,118	\$185,118		\$618,518

Note — The Water Company made an estimate on the franchise value about two and a half years ago, but a mistake was made by not making the proper banking discount for cash and will not attempt it now.

214 Reference to this tabulation, witness further testified. That the net valuation of the water works property, as inventoried and estimated by itself, was \$600,003.00, and as estimated by Mr. Dabney, \$185,118.00, and by Mr. Alvord was \$618,518.00. The Water Company's valuation, however, did not include the franchise.

I will call attention first to the discrepancy in the item of preliminary development cost. I know there was considerable expense in preparing for, organizing and getting together a work of this kind. In getting up the estimate for the Water Company, I was governed largely in reference to the item of preliminary development cost by the allowance made by the master in the Knoxville case \$10,000.00. United States Supreme Court affirmed that allowance. I also know that \$15,000.00 had been allowed for the same item at Macon, Ga. Mr. Dabney allowed nothing for this item and Mr. Alvord allowed \$4,000.00, which I thought was rather an under-estimate.

With reference to the item of real estate Mr. Dabney's valuation included only the land at the pumping station and did not allow anything, whatever, for the two lots upon which the stand pipe is located. These lots were in the heart of the city and are worth not less than \$2000.00, for which he allowed absolutely nothing.

With reference to item of pumping shaft and tunnel, Mr. Dabney did not allow one cent for the pumping shaft proper, because he said it was too small for 3 million gallon turbine pumps of the size and kind he had proposed for the city plant. Therefore he recommended that this shaft be filled with rubble concrete and a larger one built outside of the building but over the present tunnel. When I saw this report I sent a blue print with the shaft to A. M. Luckett & Company of New Orleans, one of the largest firms of contracting engineers in the South, to ascertain from them, whether the shaft was large enough for the three, four million gallon turbine pumps and requested that, if it was, that they give me a
215 blue print showing how it could be done. I then had a cut made of A. M. Luckett & Company's drawing of the shaft, showing how the pumps could be installed and also another cut of the tunnel. I then issued two circular letters containing said cuts and mailed them to the citizens of Vicksburg.

Mr. Dabney also allowed nothing for the Water Company's stand pipe, to which fact attention was directed in the circulars mentioned above.

The cuts referred to above are as follows:

(Insert cuts).

I will further state with reference to the pumping shaft that I think Mr. Alvord is very much too low in his estimate for the value of the tunnel and shaft at \$11,639.00. Mr. Dabney put the tunnel at \$2700.00 and allowed nothing for the shaft. I have had a great deal of experience with the earth where this shaft was sunk and so has the city, as I have observed. The city undertook to sink a shaft, not so deep as the Water Company's in constructing a sewerage outlet. The lowest bid for the work was 5,000.00, but the City Engineer thought it could be constructed for less and advised that the bid be rejected, which was done, and he thereupon undertook to construct the shaft for the city, and it now stands the city something like \$17,000.00.

With reference to the tubular boilers, I will state that the return tubular boiler of 165-horse power is built of the very latest design, known as "Butt-strap Triple Riveted," which is for the highest pressure of steam. It is in first class condition and has an allowance of 125 pounds pressure on it. The other return tubular boiler is also in good condition. Mr. Alvord values these two boilers at reproduction cost \$3432.00, net value \$2025.00, while Mr. Dabney values them salvage price of \$500.00. These two boilers are held in reserve in case the other boilers should be out of commission.

They form one boiler unit in operating the plant and are to be used only in case the other two units should
216 fail. They are connected up, ready for use, at any minute.

Mr. Dabney in valuing the emergency river pumping plant, valued the pump at \$100.00, which had been discarded and sold for junk. I know this to be true on account of the size of the pump he named. There was another pump on the river bank, which Mr. Dabney did not include. Mr. Alvord valued these properties at \$2337.00 reproduction and net \$1402.00, while Mr. Dabney's valuation was \$100.00.

Mr. Dabney is also very much lower on our Dean pumping

engines than Mr. Alvord or the water company. Mr. Alvord values the Dean pumping engines at reproduction \$13,470.00, net \$6,331.00, and Mr. Dabney values them at net \$3967.00. Mr. Bord, who assisted Mr. Dabney in fixing the value of these pumps, placed the reproduction at \$7,600.00, the net value at \$3967.00, and this, notwithstanding the fact that Mr. Bord had a communication from manufacturers that the pumps would cost new \$10,500.00 f. o. b. Hollyoke, Mass. The freight, piping, fixings, foundations and sections, of course, would have to be added to the manufacturer's price. Although Mr. Bord's attention was called to this, he did not change his valuation.

In reference to engineering, superintendence, administration, contingent expenses and the like, I will state that I allowed 15% in getting up the Water Company's values. This was the same as allowed by Mr. Fuller of New York for the proposed city plant. Mr. Dabney in getting up his valuation, did not allow 15% on the cost of reproduction, but upon the net value after deducting for depreciation, wear and tear, etc. Mr. Dabney, however, reversed this rule in estimating the cost of the new plant for the city and allowed 15% on the estimated cost of reproduction. Mr. Dabney deducted from the Water Company's reproduction cost \$56,000 for depreciation, had he allowed 15% by deducting the depreciation, of course, it would have made a difference of 15% on the \$56,000.00, something like \$8400.00. I cannot conceive why Mr. Dabney adopted a different basis of calculating this item in estimating the cost of the city plant and in estimating the Water Company's.

217 With reference to the item of going concern value Mr. Dabney did not allow anything for this item, though he mentions it in his report, to-wit: "It may be permissible also to touch upon the subject of going value and franchise value. These items are inseparable and depend upon the earning capacity of the plant; that is, upon its present and prospective profits. It seems fair to suppose that as long as the city, having become in possession of a public utility, finds itself making a large profit at the expense of the citizens, it would soon reduce the rate for service so as to leave only a safe margin above the operating and maintenance expenses and fix [fixed] charges."

The Water Company allowed \$145,000 for going value, and

Mr. Alvord allowed \$67,265.00. The Water Company in fixing its estimate was governed largely by valuations allowed at five other places where the works had been appraised. These valuations had been made in towns approximately the size of Vicksburg and were as follows: \$149,829, \$149,823, \$147,218, \$144,000, \$136,922. Mr. Dabney did not allow anything for franchise value, or going value, though he mentioned that, as stated above. He admits the franchise value, the same as he does the going value, but allowed nothing for either. Mr. Alvord allowed for the franchise \$174,219.00. The witness further testified I have added up the items which are allowed for in Mr. Alvord's report and are entirely excluded in Mr. Dabney's, and they aggregate \$312,260.00. If these items omitted entirely by Mr. Dabney should be added to the valuation of the property made by him, they would aggregate \$497,381.00, which would make Mr. Dabney nearer the true valuation. Mr. Dabney's report as made by him, is not a fair and reasonable value.

In reference to the stand pipe alone, the Water Company valued it at \$17,000.00 reproduction, \$15,640.00 net, while Mr. Alvord valued it at \$15,620, net \$11,090.00. Mr. Dabney did not allow one dollar for this and this item
218 does not appear in the tabulation. Mr. Dabney did not even refer to the stand pipe in his report. Mr. Dabney in estimating the cost of a new plant for the city, also left out items that should have been included, particularly the interest on the investment during the period of construction and before being put in successful operation. He estimated the plant to cost \$340,000.00 and he should add to this at least \$30,000.00 by way of interest, during the period required to build the plant and put it in operation, before it would commence to earn on the investment. He also left out the item of service pipes or pipes connecting the water mains to the consumers buildings. This the city has put in on all the pipes which it has laid heretofore, and somebody will have to put them in before making a water system available for use. I estimate this item at \$30,000.00 additional. In addition there would be something like eight or ten thousand dollars more required to go under streets which have been paved, making approximately \$40,000.00 that should be added for service connections.

Mr. Alvord in estimating the value of the Water Company's

plant, allowed two years for constructing the plant and putting it in operation. Adopting this as a basis for computing interest on the capital invested, it would make only a little over \$18,800.00 for interest. While the two years time for constructing and putting it in operation is rather small, we will adopt that as a proper basis. The two items, therefore, for service connections \$40,000.00 and interest \$18,800.00, would make a total of \$58,800.00, which Mr. Dabney left off in estimating the cost of a new plant for the city. The city has already put out about \$30,000.00 for mains paid up to this time. That should also be added to his estimate, but since it has already been paid, I will merely add to it the \$58,800.00 for service pipes and interest which would increase his estimate from \$340,000.00 to \$398,800.00. Mr. Dabney

219 gives no details of his plans for a new water works in reference to the filter plant basins and things of that sort, and, of course, without going into these details, one cannot see anything about how much would be the actual cost of construction. Some of his items, I consider fair in valuation, particularly the laying of mains and some of the pumping machinery.

The Dabney reports that I have just gone over in detail and pointed out the errors and imperfections, was the same that was mailed to all the voters of the City of Vicksburg in the local election, and in my judgment, it was not a fair presentation of the issues to the people.

220 The witness being asked if the Water Company, or any of its agents, officers or employees have done anything to mislead the city or induce it to lay water mains on any of the streets. Witness said in substance, "No, sir, neither the Water Company nor its employees have done anything to deceive the city about laying the water mains which have already been put down by the city, but on the contrary, the Water Company has protested to the City Council against laying of these mains and still protests. I will state further that as soon as the agents of the Water Company were apprised by the Water Company's attorneys that it had a legal right to prevent the city from erecting a water works of its own, to be operated after the end of the franchise, this suit was immediately brought, and I will state further, that during the time that the city was installing the mains, we were negotiating all the time to see if we could not get together on a

sale of the property to the city, and I was impressed all along that the city was laying mains to bear the market price of our property, and, therefore, did not give it much consideration. I will add that the streets upon which the city has laid mains is, in some instances, where they can be connected with the mains of the present plant with some degree of advantage and value for future use, and this was another reason that prevented me from giving the matter such consideration. I notice the city did not install any mains on the principal streets in the heart of the city where the Water Company has a large sixteen-inch main, before the street was paved. However, we have all along strenuously protested against the city laying the mains and are still doing so, to the best of our ability in this suit.

Witness further testified that he was present at a meeting of the Board of Mayor and Aldermen held on the 9th day of October, 1911, and heard the reading of the water committee report advising a bond election, and also heard the reading of a letter from the Mayor of Helena, Montana, to Alderman Harding, and that he listened to the debate upon these papers and upon what effect the city should take in reference to voting bonds to build a new water works. In 221 this connection he said: "I remember distinctly at that session, one of the Aldermen, Mr. Stein, read a goodly portion of the Helena letter which Mr. Harding had received from the Mayor, and in commenting on the situation, he said, that the situation at Helena had been the same as in Vicksburg in the fight with the Water Works Company and was an example for Vicksburg to follow. Mr. Stein further said that the letter showed the wonderful change which came about on the part of the Water Works Company at Helena in its efforts to sell, when it was found out that the city would really build its own plant. The original offer to sell to the City at [of] Helena was \$1,386,000.00, and this was finally lowered to \$400,000.00 when a bond issue had been issued and Helena was ready to build its own plant. Mr. P. M. Harding at the same meeting, in speaking on the same subject, read the entire letter which he had received from the Mayor of Helena, and commenting on the matter said: "The fight on the Water Works Company at Vicksburg was of the same kind at Helena long and continuous and that it was an example for Vicksburg to follow." or words to that effect. Alder-

man Harding further referred to the Helena situation and said that he thought the only method to get a reasonable proposition from a water company, as they are all more or less alike, is to show a real business like determination for the city to help itself as Helena did, and that the water man suddenly realizes that his plant is not near so valuable as he at first thought it to be. I will state that at that meeting Alderman Montgomery said he wanted to submit the election so the voters could either vote to buy the present plant or build one, and Mr. Brunini, the attorney for the city shook his head at Alderman Montgomery. Alderman Montgomery replied, "You need not shake your head at me, for I am not going to vote until I understand it." Then Alderman Montgomery asked Mr. Brunini the question, if the bond election was carried to bild [build], if these bonds could be used to buy the present plant, and Mr. Brunini said to him, "No."

222

Alderman Montgomery then said to Mr. Brunini, "Well, then, how is it." Mr. Brunini then said, that if the election was carried to build, if the Water Company will then come down to about what we think is a proper price for its works, then another election can be called to issue bonds for that plant. Alderman Montgomery said, "Oh, is that the way of it." The motion to build a water works was then submitted and carried. Alderman Montgomery voted for it. There were other discussions there that night, but these were the main ones. That was the night they decided to build a new water works and to vote bonds for that purpose. The meeting was held on October 9th, 1911, and the next day the Herald contained a report of it, reporting Mr. Harding's remarks in substance, as I have stated them above, but it did not report the conversation between Mr. Montgomery and Mr. Brunini. When asked whether or not the Helena letter, the mailing out of the Dabney circular had any effect on the election, the witness said in substance: "Yes, sir; the Helena letter was published in the Herald on the second day following its reading by the Board of Mayor and Aldermen and afterwards in the Dabney circular. These publications had wide circulation and I think undoubtedly had large influence and these and the talk that the city did not intend to build anyway, changed the general impression and thought and almost everybody got into the band wagon, so to speak, with that idea in view. I think there was no question but that kind

of literature and talk changed the election entirely from what the sentiment was at the beginning of the campaign.

After the bond election had been carried and from that time to this the city has done nothing towards the construction of a new plant or advertising in selling the bonds. On the contrary, it has made repeated efforts to deal with the Water Company on a sale of its property, and after considerable negotiation made an offer of \$340,000.00 for the Water Company's plant.

223 One of the Aldermen, Mr. Ben Stein, a short time after the election said to me that they, meaning the City Council, knew that the promise was made that the city did not intend to build during the election, hung over them like a mill stone, and on that account every effort had to be made to buy the present plant.

In answer to the general question provided under the rules, the witness said in substance, I would like to state something further about an offer to have the property appraised.

When Mr. Dabney was valuing our property, we requested the city to let Mr. Alvord be with him in this work, in order that nothing would be overlooked in the valuation. The Water Company's proposition being in words and figures as follows to-wit:

"Gentlemen:

The communication laid before your Honorable body on September 4th last, by the Wayer [Water] Company requested that you let us have Mr. John W. Alvord (at our own expense) work with your Mr. A. L. Dabney in appraising or valuing our water works property thereby enabling each to check the other so that no mistake would be made, and in case these two failed to agree on the valuation that they be empowered to select a third engineer to work with them in estimating the value of said properties, neither the city nor the Water Company, to be bound by said valuation unless they desired to be bound, and said communication stated that in case you did not consent to the foregoing proposition the Water Company would employ Mr. Alvord to make an independent valuation. This communication you have not answered.

The Water Company begs now to inform you that it has employed Mr. Alvord to make a valuation of all of its prop-

erties, tangible and intangible, including every element of value, pertaining thereto, and that he is now having the work done. We would be glad to have your Mr. Dabney co-operate with him and check his work in making this valuation and should these two gentlemen fail to agree it is our desire that they be authorized to select a third engineer to assist in making the valuation and appraisement a majority vote of the engineers to control.

In this way a valuation would be arrived at which would be perfectly faith [fair] both to the Water Company and to the city.

The Water Company begs further to say, that it is willing to agree in advance to sell its property at whatever valuation and appraisement such board of engineers might award, provided the city will agree to purchase at such valuation.

In case the city is unwilling to bind itself to purchase at such valuation the Water Company is willing that neither party be bound by the valuation.

We certainly desire no advantage one way or the other in the matter."

The city declined this offer, so that nothing came of it. I would also like to state that Mr. Dabney in estimating the cost of the proposed city plant, left out the item of mains already laid, which at that time amounted to about \$22,000.00. His tabulations footed up only \$340,000.00, as the cost of the new plant, and this was discussed as the total cost of a new plant but as a matter of fact, Mr. Dabney knew that it did not contain the \$22,000.00 already paid out in laying water mains. He also knew that it did not contain the item of service pipes of \$40,000.00, or interest, during construction of \$18,800.00, making a total of \$80,800.00. By leaving out these items he made it appear that a new plant could be constructed for much less than the true and necessary cost and then, by leaving out [out] sundry items, which I have already called attention to in valuing the water works plant, which aggregated \$312,263.00, his report was a gross fraud and misrepresentation of the true facts to the citizens of Vicksburg and was calculated to deceive and did deceive them after the true facts involved. These misrepresentations, as I view it, entirely controlled the bond election and caused it to carry for the issue of bonds. I will state further, that the talk, during the bond election, to the effect that the city did not

225 intend to build, that they wanted the bond election carried, so as to make the Water Company come down in its price, and especially the publication of the Helena letter as a criterion and example to force the Water Company to reduce its price, was a gross fraud and deception, and under this guise the voters were largely voting for one thing while they wanted another, so that the real wishes and desires of the voters were not obtained at the ballot boxes.

On cross-examination, the witness Crumpler, testified:

I have stated in a general way what I thought about the cause and the change of sentiment that prevailed prior to the election. It is impossible to say you see a thing and yet you know it. I know the wind blows, but I cannot see it, and I know a man breathes but I cannot see it, and it is only in that way that we know things sometimes that cannot be explained any more in detail. I do not know that I can point to or name a single person who would say that his vote was changed by the publications I have referred to. There were a good many publications by private individuals in the newspapers at the same time. I cannot distinguish between the effect made on the public mind by private publications and those put out by the city. I think the Helena letter was the slogan in the whole campaign. It was published first in the newspaper; I do not know who put it there, but I do know it was afterwards published in the Dalney pamphlet and sent out to the voters by the city. When asked if he could name any individual voters who wanted to vote against the bond issue and was fraudulently induced to vote for it, the witness said: As I have stated, it is one of those things, if a man changes his mind, he wouldn't want to tell you about it. In fact he won't do so. I don't know that I could give you a single name that would say that he intended to vote one way and afterwards voted another. I only know that it was the general talk and especially at the beginning of the election when the City Council first talked about calling the election to build that there was some 1425 petitioners in the city asking the
 226 city to put the question two ways, and this was evidenced to the fact that they would like to vote on the present plant, and that afterwards the vote was so overwhelming, shows that something changed their minds from the time they signed this petition, which the City Council did

not give them the privilege of voting on, and I think there was something like six or seven hundred of these people qualified, registered voters. That is the foundation of my charge, at least, it is one of the circumstances which shows what I contend for.

Received copy of the foregoing abstract of evidence on this 17th day of Feb., 1913.

BRUNINI & HIRSCH,
GEORGE ANDERSON,
O. W. CATCHINGS.

The above and foregoing has the following indorsement thereon, to-wit: 119 Eq. W. A. Henson, Recv., vs. Mayor & Aldermen of Vicksburg. Præcipe of Complainant. Filed & ent'd Feb. 17, 1913. L. B. Moseley, Clerk. J. H. Short, D. C.

227 MOTION TO SUPPRESS DEPOSITIONS OF COMPLAINANT.

In the District Court of the United States for the Western Division of the Southern District of Mississippi.

W. A. Henson, Receiver,
v.

Mayor & Aldermen of the City of Vicksburg.

Now comes the defendant, by its solicitors, and moves the Court to suppress the depositions of the following witnesses, taken on behalf of the complainant, to-wit:

A. M. Paxton,
Louis P. Cashman,
C. E. Wright,
J. G. Cashman,
E. A. Fitzgerald,
M. O. Crumpler,
Abe Kiersky, and
J. A. Alvord.

And for cause shows that the said depositions, and each and every part thereof, are wholly incompetent, irrelevant and immaterial, and have no bearing whatever upon the issues of this cause.

GEORGE ANDERSON,
JOHN BRUNINI,
O. W. CATCHINGS,
Solicitors for Defendant.

The above and foregoing has the following indorsement thereon, to-wit: ± 119 Equity. W. A. Henson, Receiver, vs. Mayor & Aldermen of the City of Vicksburg. Motion to Suppress Depositions of Complainant. Filed and ent's Jan. 6, 1913. L. B. Moseley, Clerk. J. H. Short, D. C.

228 ABSTRACT OF DEFENDANT'S TESTIMONY.

Defendant's Testimony.

A. M. PANTON, City Clerk, testified that the records of his office showed that contracts for the laying of water mains forming part of a new system were let on the dates hereinafter stated and that the sums hereinafter stated have been paid out by the city therefor:

Chambers Street,	\$3332.32	June 20, 1910.
Drummond, Cherry and Harris Streets,	\$20649.07	Feb. 1, 1910, June 20, 1910, respectively.
Belmont Street,	\$1517.35	July 17, 1911.
Grove Street,	\$2238.60	October 4, 1911.
Howmar Avenue,	\$3577.68	—, 1912.
Baum Street,	\$653.99	—, 1912.

Total payments for water mains aggregating \$29,969.21.

229 That the records of his office show no protest of any character against the laying of these mains or

of the letting of these contracts to have been made by the Vicksburg Water Works Company, by M. O. Crumpler, secretary, and delivered to the Mayor and Aldermen of the City of Vicksburg, to-wit:

"To the Honorable Mayor and Aldermen of the City of Vicksburg, Mississippi:
Gentlemen:

This is to give you formal notice that in the opinion of our attorneys the contract made by your Honorable Body with the Southern Paving Construction Company to lay water mains on Drummmond, Harris, Cherry and Chambers streets in this city were without authority of law and were therefore illegal and void, and that the money paid thereon was illegally paid and may now be recovered from said Southern Paving Construction Company by your Honorable Body by proper suit.

The undersigned, therefore, now requests your Honorable Body to take immediate and proper steps to recover said money. Should you fail to do this is to give you further notice that the undersigned, as a taxpayer, will undertake to make such recovery from the said Southern Paving Construction Company for the use and benefit of the City of Vicksburg, Mississippi.

Respectfully submitted,

VICKSBURG WATER WORKS CO.

By M. O. CRUMPLER, Sec'y.

This 16th day of October, 1911.

To the Honorable Mayor and Aldermen of the City of Vicksburg, Mississippi:
Gentlemen—

The undersigned is advised that your Honorable Body has advertised for bids for the construction of water mains in and along certain streets in the City of Vicksburg, and that you propose to contract for the laying of said mains without first submitting said contract to a vote of the qualified electors of said city and obtaining their consent to the letting of said contract as you are required by law to do.

You will, therefore, please take further notice that the undersigned, as a taxpayer, will resist the letting of any con-

tract for the construction of water mains in and along any of the streets in the said City of Vicksburg, until you have first complied with the law in regard to the letting of such contracts and will take such proper legal steps as it may deem advisable to prevent payment, out of city funds, upon any such illegal contract.

Respectfully submitted,

VICKSBURG WATER WORKS CO.

By M. O. CRUMPLER, Sec'y."

This 16th day of October, 1911.

J. D. LAUGHLIN testified that he is Clerk of the Chancery Court of Warren County, Mississippi, and that among the records of his office is a certain suit entitled *W. A. Henson et al. v. Mayor and Aldermen of the City of Vicksburg et al.*, and the record thereof was introduced as an exhibit to his testimony, showing that the purpose of the suit was to recover on behalf of the City of Vicksburg and as one of its taxpayers, certain sums of money theretofore paid out by it for the laying of water mains on the sole ground that in making said payments the city had exceeded the debt limit allowed by its charter, and that for that reason alone the contracts were void.

J. H. SHORT testified that he is Deputy Clerk of the District Court of the United States for the Western Division of the Southern District of Mississippi, and that the records of his office contain a suit brought by *W. A. Henson, Receiver*, against the Mayor and Aldermen of the City of Vicksburg, the record of which was introduced as an exhibit to his deposition, showing that a suit similar in all respects to the one above referred to had been brought by *W. A. Henson, Receiver*.

FINAL DECREE.

In the District Court of the United States for the Western
Division of the Southern District of Mississippi.

W. A. Henson, Receiver,

vs.

No. 119 Equity

Mayor and Aldermen of the City of Vicksburg.

Final Decree.

This cause came on to be heard at the January Term, 1913, of this Court and was argued by counsel, and the same was by consent taken under advisement to be decided in vacation as of the said January Term, 1913; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, to-wit:

That the complainant, W. A. Henson, Receiver, is entitled to the relief prayed for by him, and that the motion for the preliminary injunction be sustained, and that the Mayor and Aldermen of the City of Vicksburg be and the same are hereby enjoined and restrained from building or constructing a system of waterworks, or any part thereof, within said city until after the 18th day of November, 1916, the date of the termination of the franchise granted by defendant to Samuel R. Bullock & Company, on November 18th, 1886, which franchise is now owned by the Vicksburg Water Works Company and under which the said water works are now being operated by complainant, W. A. Henson, receiver.

It is further ordered and decreed that the defendant, the Mayor and Aldermen of the City of Vicksburg, be and is hereby enjoined from disposing of the issue of four hundred thousand dollars (\$400,000.00) of bonds mentioned and described in the pleadings with a view of constructing a water works system, or any part thereof, in said city during the life of the said franchise, that is, between now and the 18th day of November, 1916.

It is further ordered, adjudged and decreed
232 that defendant pay the costs of this proceeding to be taxed for which execution may issue.

Ordered, adjudged and decreed this 4th day of February, 1913, as of the January Term, 1913 of said Court.

H. C. NILES, Judge.

The above and foregoing has the following indorsement thereon, to-wit: #119 Equity. In District Court of the United States, Western Div. So. District. W. A. Henson, Receiver, v. Mayor & Aldermen of the City of Vicksburg. Final Decree. Filed & entd. Feby. 6, 1913. L. B. Moseley, Clerk. J. H. Short, D. C.

2753 **OPINION OF HON. H. C. NILES, JUDGE OF
THE U. S. COURT FOR THE SOUTHERN
DISTRICT OF MISSISSIPPI.**

In the District Court of the United States for the Western
Division of the Southern District of Mississippi.

W. A. Henson, Receiver,

vs.

The Mayor and Board of Aldermen of Vicksburg.

By an act of the Legislature of the State of Mississippi, approved on the 18th day of March, 1886, the City of Vicksburg, Mississippi, was authorized "to provide for the erection and maintenance of a system of water works to supply said city with water," and to that end to contract with a party or parties who shall build and operate water works." The city received competitive bids for the construction and maintenance of said water works, and on November 18th, 1886, through its Mayor and Aldermen, contracted with Samuel R. Bullock and Company, their associates, successors and assigns, for a supply of water for public use, and gave said City of Vicksburg an option to purchase the said works. A part of the first section of that contract is as follows:

"That in consideration of the public benefit to be derived therefrom, the exclusive right and privilege is hereby granted for the period of thirty (30) years from the time this ordinance takes effect unto Samuel R. Bullock and Company, their associates, successors and assigns, of erecting, maintaining and operating a system of water works in accordance with the terms and provisions of this ordinance, and of the streets, alleys, public squares and other public places within the corporate limits of the City of Vicksburg, Mississippi, as they

now exist or may hereafter be extended, and within such other territory as may now or hereafter be under its jurisdiction, for the purpose of laying pipes, mains and other conduits and erecting hydrants and other apparatus for conducting and furnishing an adequate supply of good wholesome water to the City of Vicksburg, Mississippi, and to its inhabitants for public and private use, and for making repairs and extensions to the said system from time to time during the period in which the ordinance shall be in force, etc."

Section 9 of said contract ordinance is as follows:

"At the expiration of each period of ten years after that ordinance takes effect the Mayor and Aldermen of the City of Vicksburg, Mississippi, shall have the right and privilege to purchase the said water works provided they notify the said Samuel R. Bullock and Company, their associates, successors or assigns, of their intention so to do at least one year before the expiration of said period of ten (10) years.

234 The value of said system shall be ascertained as follows: The said Samuel R. Bullock and Company, their associates, successors or assigns, and the Mayor and Aldermen of the City of Vicksburg, shall severally appoint one person, the two appointed shall choose a third, and the three persons thus chosen, who shall be hydraulic engineers, shall constitute a board to determine the value of said system of water works. None of the board shall be residents of said Warren County. The said Mayor and Aldermen of the City of Vicksburg shall within sixty days after the said board have rendered its decision, pay the amount awarded in cash. A failure to so pay the award, or to give notice of intention to purchase shall operate as a waiver of the right to purchase until the expiration of the next succeeding period of ten years."

Reference to Volumes 185 from page 65 to 83 and 202 from page 453 to 472 and 206 from page 496 to 516, U. S. Supreme Court Reports, will show the history of the controversy between the City of Vicksburg and the present complainants. The only question presented in the present controversy that this Court thinks is necessary to consider, is whether this matter has been determined by a former decree of this court and affirmed by the Supreme Court of the United

States in *Vicksburg vs. Vicksburg Water Works Company*, 202 U. S., pages 460. The importance of this question and the interests to be affected by our decision and of the earnest contention of learned counsel has had careful consideration.

It will not be denied or questioned that "a right, question or fact, distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and, even if a second suit is for a different cause of action, the right, question or fact once so determined, must, as between the same parties or privies, be taken as conclusively established so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicious tribunals would not be invoked for the vindication of rights of persons and property, if as between parties and their privies conclusiveness did not attend the judgments of such tribunals in respect to all matters put in issue and actually determined by them."

S. P. R. vs. U. S., 168 U. S. 48-49.

A number of cases are cited to illustrate the general rule.

Now what question or fact was distinctly put in issue and directly determined by this Court and the Supreme Court of the United States in *Vicksburg vs. Vicksburg Water Works Co.*, decided at the October Term of the United States Supreme Court, 1905, Vol. 202, page 460? The decree, say the Supreme Court, in the court below, was in favor of the Water Works Co., enjoining the city during the period of the contract from constructing a water works system of its own." The Supreme Court adds, "the assignments of error necessary to be considered are —2— "The enforcing the contract with the city in favor of complainant, and restraining the city from erecting water works of its own during the term covered by the contract with complainant." At page 461 the Supreme Court say: "We shall proceed to notice these (assignments of error) in the order named," and on page 462 the Court uses the following language. "The principal controversy in the case is as to the correctness of the decree of the Court below restraining the city from erecting water works of its own within the period

named in the contract, which decree proceeded upon the theory that the city had excluded itself from erecting or maintaining a system of water works of its own during that period." Coming directly to the question whether this is an exclusive contract, the question resolves itself into two branches: Had the city the right to make a contract excluding itself? And, if so, has the contract now under consideration that effect? The Legislature of the State of Mississippi, on March 8, 1886, in the charter of the City of Vicksburg, among others gave the city the following powers: to provide for the erection and maintenance of a system of water works to supply said city with water and to that end to construct with a party or parties who shall build and operate water works."

236 "The question is now, whether the city might make a contract giving the exclusive right as against all third persons to erect a system of water works, but whether it can in exercising this legislative power exclude itself from constructing and operating water works for the period of years covered by the contract." The Court adds, without resort to implication or inserting anything by way of intendment into this contract, it undertakes to give by its terms to Bullock and Company, their associates, successors and assigns, the exclusive right to erect, maintain and operate water works for a definite term to supply water for public and private use. These are the words of the contract, and the question upon this branch of the case is, conceding the power of the city to exclude itself from competition, has it done so by the express terms used? It has contracted with the company in language which is unmistakable, that the rights and privileges named and granted shall be exclusive. * * * It is difficult to conceive of words more apt to express the purpose that the company shall have the undivided occupancy of the field so far as the other contracting party is concerned. The term "exclusive" is so plain that little additional light can be gained by resort to the lexicons. If we turn to the Century Dictionary we find it defined to mean "appertaining to the subject alone"; not including, admitting or pertaining to any other or others; undivided; sole; as an exclusive right or privilege; exclusive jurisdiction." We think, therefore, it requires no resort to implication or intendment in order to give a construction to this phase of the contract; but, on the other hand, the city has provided and the company has accepted a grant which

says in plain and apt words that it shall have an exclusive right, a sole and undivided privilege. To hold otherwise in our view would do violence to the plain words of the contract and permit one of the contracting parties to destroy and defeat the enjoyment of a right which has been granted in plain and unmistakable terms. Any other construction seems
 237 to us to ignore the language employed, and to destroy its benefit to the other. We think the Court below did not err in reaching this conclusion."

The decree of the Court (Court below) was in favor of the Water Works Company, maintaining its right to the contract for hydrant rentals and enjoining the city during the period of the contract from constructing a water works system of its own."

Believing, as we do, that the real question here presented has been decided in express terms by this Court, and affirmed by the Supreme Court of the United States in 202 U. S. 458-472, and is *res judicata*, it is not necessary to consider any other question presented by learned counsel.

We, therefore, conclude that the injunction prayed for by complainant against the City of Vicksburg building its own water works during the life of this contract should be granted. Decree accordingly.

H. C. NILES, Judge.

The above and foregoing has the following indorsement thereon, to-wit: ± 119 . In the District Court of the United States for the Western Division of the Southern District of Mississippi. W. A. Henson, Receiver, vs. Mayor & Aldermen of Vicksburg. Conclusion of Court or Right of City to Construct. Filed and ent'd Jan. 22, 1913. L. B. Moseley, Clerk. J. H. Short, D. C.

238 PRAYER FOR APPEAL AND ORDER ALLOW-
ING SAME.

In the District Court of the United States for the Western
Division of the Southern District of Mississippi.

W. A. Henson, Receiver of the Vicksburg Water Works
Company, et al.,

vs.

Mayor and Aldermen of the City of Vicksburg.

The above named defendant, Mayor and Aldermen of the City of Vicksburg, a municipal corporation under the laws of the State of Mississippi, conceiving itself aggrieved by the decree rendered on the — day of February, 1913, in the above entitled proceeding, doth hereby appeal from said decree to the Circuit Court of Appeals of the United States for the Fifth Circuit thereof, and it prays that this its appeal may be allowed and that a transcript of the record and proceedings and papers upon which the said decree was made, duly authenticated, may be sent to the Circuit Court of Appeals of the United States for the Fifth Circuit.

This 3rd day of February, 1913.

GEORGE ANDERSON,

JOHN BRUNINI,

O. W. CATCHINGS,

Solicitors for Defendant and Appellant.

And now, to-wit, on February 4th, 1913, it is ordered that the appeal be allowed as prayed for.

H. C. NILES,

Judge of the District Court of the United States
for the Southern District of Mississippi.

239 The above and foregoing has the following indorsement thereon, to-wit: \pm 119 Equity. W. A. Henson, Receiver, vs. Mayor and Aldermen of the City of Vicksburg. Prayer for Appeal and Order Allowing Same. Filed and ent'd Feb. 3, 1913. L. B. Moseley, Clerk. J. H. Short, D. C.

Whereas, the above named Mayor and Aldermen of the City of Vicksburg has prosecuted an appeal to the Circuit Court of Appeals of the United States for the Fifth Circuit to reverse a decree rendered in the above entitled suit by the Judge of the District Court of the United States for the Southern District of Mississippi,

Now, therefore, the condition of this obligation is such that if the above named Mayor and Aldermen of the City of Vicksburg shall prosecute said appeal to effect and answer all damages and costs if it fail to make said appeal good, then
 213 this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

**MAYOR AND ALDERMEN OF THE CITY
OF VICKSBURG.**

By J. J. HAYES, Mayor.

**TITLE GUARANTY & SURETY CO. OF
SCRANTON, PENN.,**

By FLOWERS BROS., Attorneys,

[Seal] E. G. FLOWERS.

Approved,

H. C. NILES,

District Judge of the United States for the
Southern District of Mississippi.

The above and foregoing has the following indorsement thereon, to-wit: \pm 119. W. A. Henson, Receiver, vs. Mayor and Aldermen of the City of Vicksburg. Appeal Bond. Filed and ent'd Feb. 7, 1913. L. B. Moseley, Clerk. J. H. Short, D. C.

244

CITATION.

In the District Court of the United States for the Western
Division of the Southern District of Mississippi.

W. A. Henson, Receiver of the Vicksburg Water Works
Company, et al.,

vs.

Mayor and Aldermen of the City of Vicksburg.

United States of America, ss.

To W. A. Henson, Receiver of the Vicksburg Water Works
Company, and Leilia Boykin, Defendants:

You are hereby cited and admonished to be and appear at a
Circuit Court of Appeals of the United States for the Fifth
Circuit to be holden at the City of New Orleans, Louisiana,
on the 1st day of March 1913, pursuant to an appeal filed in
the clerk's office of the District Court of the United States for
the Western Division of the Southern District of Mississippi,
wherein the Mayor and Aldermen of the City of Vicksburg is
appellant and W. A. Henson, Receiver of the Vicksburg Water
Works Company, and Leilia Boykin are defendants, to show
cause, if any there be, why the decree appealed from should
not be corrected and speedy justice should not be done to the
parties on that behalf.

Witness the Honorable Edward Douglas White, Chief Jus-
tice of the United States, this 4th day of February, in the year
of our Lord one thousand nine hundred and thirteen.

H. C. NILES,

District Judge of the United States for the
Southern District of Mississippi.

We, the undersigned solicitors for appellees, hereby admit
service of a copy of the above citation this 7th day of Feb-
ruary, 1913.

J. C. BRYSON,

HIRSCH, DENT & LANDAU,

Solicitors for Appellees.

245

The above and foregoing has the following indorse-
ment thereon, to-wit: \$119 Equity. W. A. Hen-
son, Receiver, vs. Mayor and Aldermen of the City of Vicks-
burg. Citation on Appeal. Filed and ent'd Feb. 12, 1913.
L. B. Moseley, Clerk. J. H. Short, D. C.

STIPULATION OF COUNSEL.

In the District Court of the United States for the Western
Division of the Southern District of the State of Mississippi.

W. A. Henson, Receiver, et al.,

vs.

Mayor and Aldermen of the City of Vicksburg.

It is hereby stipulated and agreed by and between counsel
for the complainant and the defendant in the above styled
cause that no advantage shall be had or taken of the fact that
the prayer for appeal was dated and filed on February 3rd,
1913, and the assignment of errors filed on that date, while the
final decree bears date the fourth day of February, 1913.

Witness our signature on this the 6th day of February, 1913.

J. C. BRYSON,

HIRSCH, DENT & LANDAU,

Sols. for Complainant.

GEORGE ANDERSON,

GEORGE BRUNIX,

O. W. CATCHINGS,

Sols. for Defendant.

The above and foregoing has the following indorsement
thereon, to-wit: ± 119 Equity. W. A. Henson, Receiver, et
al., vs. Mayor and Aldermen of the City of Vicksburg. Stipu-
lation of Counsel. Filed and ent'd Feb. 7, 1913. L. B. Mose-
ley, Clerk. J. H. Short, D. C.

247 ORDER AS TO TRANSCRIPT OF RECORD.

District Court of the United States for the Western Division
of the Southern District of Mississippi.

W. A. Henson, Receiver, et al.,

vs.

Mayor & Aldermen of the City of Vicksburg.

This day came on to be heard the controversy which has arisen between the parties hereto as to the general contents of the record to be prepared on the appeal now pending to the Circuit Court of Appeals for the Fifth Circuit, and the Court having considered the same, it is ordered that the record on appeal shall consist of the documents enumerated in the precepts filed by the appellant and the appellees respectively and the abstract of the complainants testimony filed by them on the 17th day of February, 1913, and so much of the abstract of the testimony prepared by the defendant and appellant and filed on the 7th day of February, 1913, as relates to the "Defendants Testimony," as set out on pages 7, 8, & 9 of said abstract, the testimony of complainants as condensed by them being made part of the record over the protest and objection of defendant.

So ordered this 18th day of February, 1913.

H. C. NILES, Judge.

The above and foregoing has the following indorsement thereon, to-wit: \pm 119 Equity. W. A. Henson, Receiver, et al., vs. Mayor & Aldermen of the City of Vicksburg. Order as to Transcript of Record. Filed & ent'd Feb. 19, 1913. L. B. Moseley, Clerk. J. H. Short, D. C.

248 I, L. B. MOSELEY, Clerk of the District Court of the United States for the Western Division of the Southern District of Mississippi, do hereby certify that the foregoing 247 pages constitute a true and correct transcript of the record of all of the papers and proceedings in this case, in accordance with the directions of the decree of the Honorable H. C. Niles, Judge, dated February 18, 1913, containing directions as to what shall constitute the transcript of record on appeal of this case.

Witness my signature and seal of office this the 22nd day of February, 1913.

L. B. MOSELEY, Clerk.

JOSEPH H. SHORT,

Deputy Clerk.

[Seal]

SUPPLEMENTAL TRANSCRIPT.

UNITED STATES CIRCUIT COURT OF APPEALS
FIFTH CIRCUIT

No. 2480

MAYOR AND ALDERMEN OF THE CITY OF
VICKSBURG,

Appellants,

versus

W. A. HENSON, RECEIVER OF THE VICKSBURG
WATER WORKS COMPANY, ET AL.,

Appellees.

Motion for Certiorari to Perfect Record, and Exhibits Annexed
Thereeto.

[ORIGINAL RECORD FILED MARCH 10, 1913.]

U. S. Circuit Court of Appeals. Filed Mar. 12, 1913.

FRANK H. MORTIMER, Clerk.

IN THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE FIFTH CIRCUIT.

MAYOR AND ALDERMEN OF THE CITY OF
VICKSBURG,

Defendant and Appellant,

versus

No. 2480.

E. A. HENSEN, RECEIVER OF THE VICKSBURG
WATER WORKS COMPANY, ET AL.

Now, into court, by their undersigned counsel, come the appellees in the above numbered and entitled cause, and, suggesting to the Court that there has been omitted from the transcript sent to this Honorable Court by the Clerk of the District Court a portion of the evidence required to be incorporated therein, to-wit: Certain cuts or drawings, which are attached to a letter from the Clerk of said Court, herewith be issued a writ of certiorari, directed to the Clerk of said District Court, commanding him, forthwith, to certify to this Court said omitted portion of the record herein.

HIRSH, DENT & LANDAU,

J. C. BRYSON,

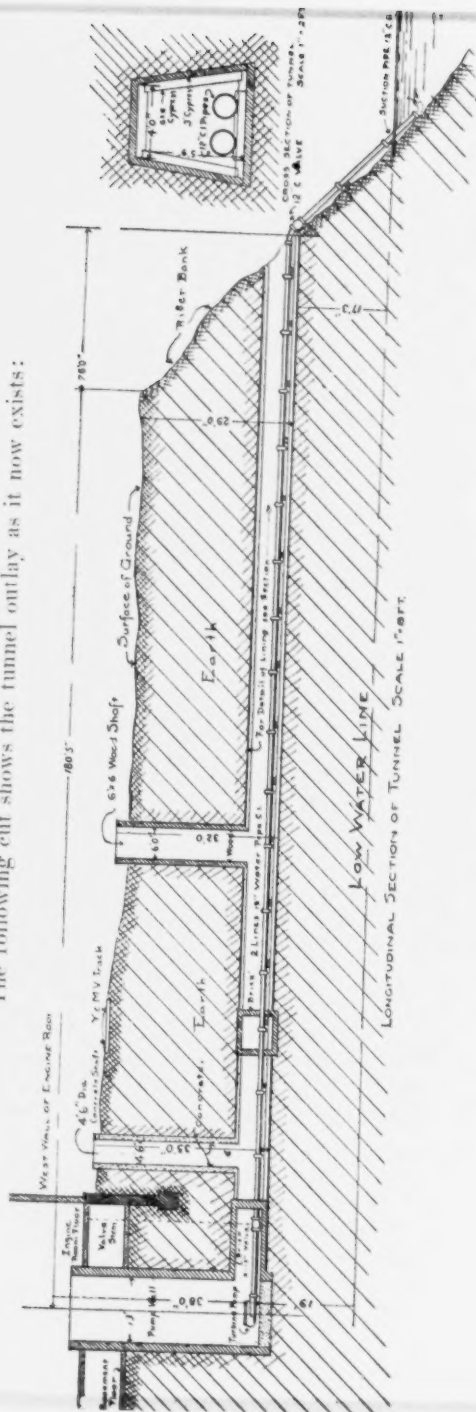
DUFOUR & DUFOUR,

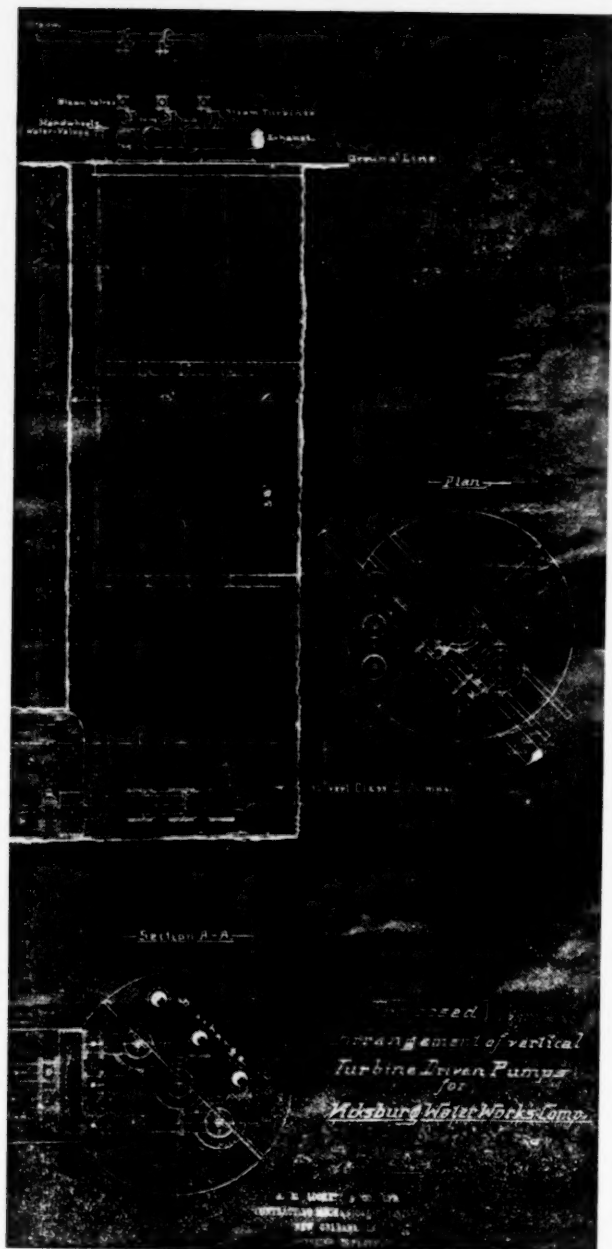
T. M. & J. D. MILLER,

Solicitors for Appellees.

[Indorsed on back:] No. 2480. In the United States Circuit Court of Appeals for the Fifth Circuit. Mayor and Aldermen of the City of Vicksburg, Defendant and Appellant, versus E. A. Hensen, Receiver of the Vicksburg Water Works Company, et al. Motion for Certiorari. U. S. Circuit Court of Appeals. Filed Mar. 10, 1913. Frank H. Mortimer, Clerk. Hirsh, Dent & Landau, J. C. Bryson, Dufour & Dufour, T. M. & J. D. Miller, For Motion.

The following cut shows the tunnel outlay as it now exists:





This cut shows the deep pump pit with the three pumps of 4-million gallon capacity each in same.

In the District Court of the United States, Western Division
of the Southern District of Mississippi.

Mayor and Aldermen of the City of Vicksburg, Defendant,
Appellant,

versus

W. A. Henson, Receiver, Vicksburg Water Works Company,
and Lelia Boykin, Complainants, Appellees.

I, L. B. Moseley, Clerk of the above named Court, hereby
certify that the attached pictures or cuts are the pictures or
cuts referred to in abstract of appellees' testimony on page 192
and that same should have been included in transcript of the
record, which was certified by me to the United States Circuit
Court of Appeals for the Fifth Circuit.

Witness my hand and the seal of said Court at Vicksburg,
Mississippi, this 25th day of February, A. D. 1913.

[Seal]

L. B. MOSELEY, Clerk.

J. H. SHORT, D. C.

[Indorsed on back:] No. 2480, United States Circuit Court
of Appeals, Fifth Circuit. Mayor & Board of Aldermen of
the City of Vicksburg vs. E. A. Hensen, Receiver, et al. Let-
ter of Clerk with omitted portion of record. U. S. Circuit
Court of Appeals, filed March 10, 1913. Frank H. Mortimer,
Clerk.

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz.:

MOTION OF APPELLEES TO DISMISS.

Filed March 17th, 1913.

In the United States Circuit Court of Appeals, for the Fifth Circuit, at New Orleans, Louisiana.

Mayor and Aldermen of the City of Vicksburg
 versus No. 2480.
 W. A. Henson, Receiver.

And now into court, by his undersigned counsel, comes W. A. Henson, receiver in the above entitled cause, and moves the Court to dismiss the appeal taken herein by said Mayor and Aldermen, for the reasons following; that is to say:

1.

It is manifest from the record, proceedings and final decree of the Court below that, in decreeing the injunction complained of, the said District Court of the United States merely enforced and gave effect to its former decree in a certain suit that depended in said District (then Circuit) Court of the United States, in which the Vicksburg Water Works Company, now represented by the appellee Henson, its receiver, was complainant, and said appellant was defendant, in No. 41 upon its equity docket, and to the mandate of the Supreme Court of the United States, upon its judgment and decree affirming said final decree of said Circuit Court, upon the appeal of said Mayor and Aldermen, the present appellant, therefrom, so that this Honorable Court is without jurisdiction of this appeal.

2.

This Honorable Court is without jurisdiction to revive, modify or limit the said judgment or decree of said Supreme Court, so affirming said decree of said Circuit Court, enjoining

the appellant herein from constructing water works in said City of Vicksburg, during the existence of the said exclusive franchise of said Water Works Company, which expires November 18th, 1916.

32

Inasmuch as the decree appealed from, at the suit of said receiver of said Vicksburg Water Works Company, merely enforced and gave effect to said former decree, and to said mandate of the Supreme Court affirming the same, no appeal lies to this Honorable Court, but only to the Supreme Court of the United States.

For other and manifest reasons appearing upon the face of the record,

(Signed) HIRSH, DENT & LANDAU,
(Signed) J. C. BRYSON,
(Signed) T. M. MILLER,
Counsel and Solicitors for Appellee.

In the United States Circuit Court of Appeals for the Fifth
Circuit, at New Orleans, Louisiana.

Mayor and Aldermen of the City of Vicksburg
 versus No. 2480.
 W. A. Henson, Receiver.

To Said Appellant, or to Messrs. George Anderson, John Brunini, Charles Payne Fenner, and W. O. Catchings, Solicitors for Appellant:

You will please take notice that on Monday, March 17th, 1913, at the hour of eleven o'clock A. M., or as soon thereafter as practicable, at the court room of said Court, in the custom house, in the City of New Orleans, the said appellant will present to said Circuit Court of Appeals a motion to dismiss the appeal taken in said cause, for the reasons set forth in his motion, a copy whereof is annexed to this notice.

(Signed) HIRSH, DENT & LANDAU,
(Signed) J. C. BRYSON,
(Signed) DUFOUR & DUFOUR,
(Signed) T. M. MILLER,
Solicitors and Counsel for Appellee.

Service of a copy of the above notice and motion is acknowledged on this 13th day of March, 1913.

(Signed) CHAS. PAYNE FENNER,
Solicitor for Appellant.

ORDER, MOTION TO DISMISS CONTINUED, TO BE HEARD WITH MERITS.

Extract from the Minutes of March 17th, 1913.

Mayor and Aldermen of the City of Vicksburg
vs. No. 2480.
W. A. Henson, Receiver of Vicksburg Water Works Co., et al.

Ordered by the Court that the motion filed by the appellees to dismiss the appeal herein, be, and it is hereby continued to March 26th, 1913, to be heard with the merits of the cause.

ARGUMENT AND SUBMISSION.

Extract from the Minutes of March 26th, 1913.

Mayor and Aldermen of the City of Vicksburg
vs. No. 2480.
W. A. Henson, Receiver of the Vicksburg Water Works
Company et al.

On this day this cause was called, and, after argument by Charles Payne Fenner, Esq., and O. W. Catchings, Esq., for appellants, and J. Hirsh, Esq., and J. C. Bryson, Esq., for appellees, was submitted to the Court on the merits and on the motion to dismiss filed by appellees.

OPINION OF THE COURT.

Filed April 8th, 1913.

United States Circuit Court of Appeals, Fifth Circuit.

Mayor and Aldermen of the City of Vicksburg,

vs.

No. 2480.

W. A. Henson, Receiver of the Vicksburg Water Works.

Appeal From the United States District Court, Southern District of Mississippi.

Before PARDEE and SHELBY, Circuit Judges, and SHEPARD, District Judge.

By the COURT:

The motion to dismiss this appeal is overruled. On the merits a majority of the Judges being of opinion that the decree of the Circuit Court in No. 41 of the docket, affirmed by the Supreme Court in *Vicksburg vs. Vicksburg Water Works*, 202 U. S. 453, constitutes an estoppel against the City of Vicksburg in the present suit, the decree appealed from should be and it is affirmed.

JUDGMENT.

Extract from the Minutes of April 8th, 1913.

Mayor and Aldermen of the City of Vicksburg

vs.

No. 2480.

W. A. Henson, Receiver of the Vicksburg Water Works Company et al.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Mississippi, and on the motion to dismiss the appeal herein, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the motion to dismiss the appeal

herein be overruled, and that the decree of the said District Court, in this cause, be, and the same is hereby affirmed.

It is further ordered, adjudged and decreed that the appellants, the Mayor and Aldermen of the City of Vicksburg, Mississippi, and the surety on the appeal bond herein, the Title Guaranty and Surety Company of Scranton, Pennsylvania, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of said District Court.

PETITION FOR REHEARING.

Filed April 14th, 1913.

In the United States Circuit Court of Appeals, for the Fifth Circuit.

Mayor and Aldermen of the City of Vicksburg, Appellants,
vs. No. 2480.
W. A. Henson, Receiver of the Vicksburg Water Works Company, et al., Appellees.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

The petition of the Mayor and Aldermen of the City of Vicksburg, appellants in the above entitled and numbered cause, with respect represents that there is error to petitioner's prejudice in the decree rendered by this Honorable Court in this cause affirming the decree from which petitioner's appeal was prosecuted, and for specification of error petitioner says:

That the said decree of affirmance is based upon the ground that the decree rendered in the former suit between petitioner and the Water Works Company operates as an estoppel against petitioner in relation to the issue involved in the present suit, whereas it is respectfully submitted that the issue involved in the present suit was neither presented nor decided in the former suit, and that, therefore, the decree rendered in the said former suit cannot be held to operate as an estoppel against petitioner upon the issue now raised for the first time in the present suit.

Wherefore, petitioner prays that a rehearing may be granted in this cause, and that upon such rehearing the judgment appealed from be reversed, and that judgment be rendered in favor of petitioner, rejecting the demand of the plaintiff in the court below and dismissing his suit with costs.

(Signed) O. W. CATCHINGS,

(Signed) CHAS. PAYNE FENNER,
Solicitors for Petitioner.

The undersigned hereby certifies that he is one of the solicitors for the Mayor and Aldermen of the City of Vicksburg, appellant in the above entitled and numbered cause, and that, in his opinion, the foregoing petition for a rehearing is well founded in law.

(Signed) CHAS. PAYNE FENNER,
Solicitor for the Mayor and Aldermen
of the City of Vicksburg.

This application for a rehearing is denied.
April 15th, 1913.

ORDER DENYING REHEARING.

Extract from the Minutes of April 15th, 1913.

Mayor and Aldermen of the City of Vicksburg,

vs.

No. 2480.

W. A. Henson, Receiver of the Vicksburg Water Works
Company et al.

Ordered that the petition for rehearing filed in this cause, be, and the same is hereby denied.

PETITION FOR APPEAL AND ORDER.

Filed April 15th, 1913.

United States Circuit Court of Appeals for the Fifth Circuit.
Mayor and Aldermen of the City of Vicksburg, Appellant.

vs.

W. A. Henson, Receiver of the Vicksburg Water Works Company, and Lelia Boykin, Appellees.

Petition for Appeal.

Your petitioner, Mayor and Aldermen of the City of Vicksburg, a municipal corporation under the laws of the State of Mississippi, respectfully shows that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Fifth Circuit, and that a decree has therein been rendered on the 8th day of April, 1913, affirming a judgment of the District Court of the United States for the Southern District of Mississippi, and that the matter in controversy in said suit exceeds one thousand dollars besides costs, and that the jurisdiction of none of the courts mentioned is or was invoked solely, nor is or was dependent solely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different states, and that this cause does not arise under the patent laws, nor the revenue laws, nor the criminal laws, and that it is not an admiralty cause, and that it is a proper cause to be reviewed by the Supreme Court of the United States upon appeal; and, therefore, your petitioner would respectfully pray that an appeal be allowed it in the above entitled cause, and that the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit be directed to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States in order that the errors complained of in the Assignment of Errors herewith filed by said appellant, may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

(Signed) MAYOR AND ALDERMEN OF THE
CITY OF VICKSBURG.

By (Signed) GEORGE ANDERSON.

(Signed) JOHN BRUNINI.

(Signed) O. W. CATCHINGS.

Solicitors for Appellant.

The foregoing petition is granted and an appeal allowed as prayed for, upon appellant giving bond according to law in the sum of five hundred dollars.

April 15, 1913.

(Signed) DON A. PARDEE,
Presiding Judge of the Circuit Court
of Appeals for the Fifth Circuit.

ASSIGNMENT OF ERRORS.

Filed April 15th, 1913.

United States Circuit Court of Appeals for the Fifth Circuit.

Mayor and Aldermen of the City of Vicksburg, Appellant,
vs.

W. A. Henson, Receiver of the Vicksburg Water Works Company, and Lelia Boykin, Appellees.

Assignment of Errors.

And now comes the appellant, Mayor and Aldermen of the City of Vicksburg, a municipal corporation under the laws of the State of Mississippi, by George Anderson, John Brunini and O. W. Catchings, its solicitors, and says that in the record and proceedings aforesaid of said United States Circuit Court of Appeals for the Fifth Circuit in the above entitled cause, and in the rendition of the final decree therein, manifest error has intervened to the prejudice of said appellant, in this, to-wit:

First. Because the United States Circuit Court of Appeals for the Fifth Circuit erred in affirming the decree of the United States District Court for the Southern District of Mississippi.

Second. Because the said Circuit Court of Appeals erred in not reversing the decree of said District Court and in not ordering said District Court to enter a decree for appellant.

Third. Said Circuit Court of Appeals erred in entering a decree affirming the decree of said District Court, decreeing "that the complainant, W. A. Henson, receiver, is entitled to the relief prayed for by him, and that the motion for the preliminary injunction herein be sustained, and that the Mayor and Aldermen of the City of Vicksburg be and the same are hereby enjoined and restrained from building or constructing a system of water works, or any part thereof, within said city until after the 18th day of November, 1916, the date of the termination of the franchise granted by defendant to Samuel R. Bullock & Company, on November 18, 1886, which franchise is now owned by the Vicksburg Water Works Company, and under which the said water works are now being operated by complainant, W. A. Henson, receiver.

Fourth. Said Circuit Court of Appeals erred in affirming the decree of said District Court decreeing "that the defendant the Mayor and Aldermen of the City of Vicksburg be and is hereby enjoined from disposing of the issue of four hundred thousand dollars (\$400,000.00) of bonds mentioned and described in the pleadings, with the view of constructing a water works system, or any part thereof, in said city during the life of the said franchise; that is, between now and the 18th day of November, 1916."

Fifth. Said Circuit Court of Appeals erred in holding that "the decree of the Circuit Court in No. 41 on the docket, affirmed by the Supreme Court in *Vicksburg vs. Vicksburg Water Works Co.*, 202 U. S. 453, constitutes an estoppel against the City of Vicksburg in the present suit."

Sixth. Said Circuit Court of Appeals erred in holding that appellant has no right to build a water works system before the expiration of the franchise held by appellee, on November 18, 1916.

Seventh. Said Circuit Court of Appeals erred in not holding that appellee was estopped to assert that appellant has not the right to build a water works system of its own before the expiration of said franchise.

Eighth. Said Circuit Court of Appeals erred in decreeing that appellant should pay the costs of said appeal.

Wherefore, the said Mayor and Aldermen of the City of Vicksburg, a municipal corporation as aforesaid, prays that for the errors aforesaid and other errors appearing in the record of said United States Circuit Court of Appeals in the above entitled cause to the prejudice of the appellant, the said decree of the said United States Circuit Court of Appeals be reversed, annulled and for naught esteemed, and that said cause be remanded to the United States District Court for the Southern District of Mississippi, with instructions to set aside the decree heretofore rendered by it in this cause, and grant a new trial of the same; and for such further proceeding in said cause as may be determined upon by this Honorable Court to the end that justice may be done in the premises.

(Signed) GEORGE ANDERSON,

(Signed) JOHN BRUNINI,

(Signed) O. W. CATCHINGS,

Solicitors for Appellant.

APPEAL BOND.

Filed April 15th, 1913.

In the United States Circuit Court of Appeals, for the Fifth Circuit.

Mayor and Aldermen of the City of Vicksburg, Appellants,
vs. No. 2480

W. A. Henson, Receiver of the Vicksburg Water Works Company, et al., Appellees.

Appeal Bond.

Know All Men By These Presents: That we, the Mayor and Aldermen of the City of Vicksburg, a municipal corporation under the laws of the State of Mississippi, and Charles Payne Fenner, a resident of the City of New Orleans, State of Louisiana, are held and firmly bound unto the above named W. A. Henson, receiver of the Vicksburg Water Works Company, and Leila Boykin, in the sum of five hundred dollars (\$500.00), to be

paid to the said W. A. Henson, receiver of the Vicksburg Water Works Company, and the said Leila Boykin, for the payment whereof well and truly to be made, we bind ourselves and each of us and each of our heirs, executors, administrators and successors jointly and severally, formally by these presents, sealed with our seals and dated the 15th day of April, 1913.

Whereas, the above named Mayor and Aldermen of the City of Vicksburg has prosecuted an appeal to the Supreme Court of the United States to reverse a decree rendered in the above entitled suit by the United States Circuit Court of Appeals for the Fifth Circuit, affirming a decree theretofore rendered in the said suit by the District Court of the United States for the Southern District of Mississippi.

Now, therefore, the condition of this obligation is such that if the above named Mayor and Aldermen of the City of Vicksburg shall prosecute said appeal to effect and answer all damages and costs if it fail to make said appeal good, then this obligation shall be void; otherwise, the same shall be and remain in full force and effect.

(Signed) MAYOR AND ALDERMEN OF THE
CITY OF VICKSBURG.

By (Signed) CHAS. PAYNE FENNER,
Its Solicitor of Record.

(Signed) CHAS. PAYNE FENNER.

State of Louisiana,
Parish of Orleans.

Charles Payne Fenner, being duly sworn, deposes and says:

That he is well and truly worth the sum of five hundred dollars over and above all of his debts and liabilities.

Sworn to and subscribed before me on this 15th day of April, 1913.

(Signed) CHAS. PAYNE FENNER.

[Seal] (Signed) PIERRE D. OLIVIER,

Notary Public.

The foregoing bond is approved.

New Orleans, April 15th, 1913.

(Signed) DON A. PARDEE.

Presiding Judge, United States Circuit Court of Appeals, Fifth Circuit.

CLERK'S CERTIFICATE.

United States of America.

United States Circuit Court of Appeals, Fifth Circuit.

I, FRANK H. MORTIMER, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 224 to 234, next preceding this certificate, contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 2480, wherein the Mayor and Aldermen of the City of Vicksburg are Appellants, and W. A. Henson, Receiver of the Vicksburg Water Works Company et al., are Appellees, as full, true and complete, as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 223 are identical with the printed record and supplemental record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 29th day of April, A. D. 1913.

[Seal]

FRANK H. MORTIMER,

Clerk of the United States Circuit Court of Appeals.

United States Circuit Court of Appeals for the Fifth Circuit.

MAYOR AND ALDERMEN OF THE CITY OF VICKSBURG, Appellant,
 vs.
 W. A. HENSON, Receiver of the Vicksburg Water Works Company, and LELIA BOYKIN, Appellees.

Citation.

President of the United States to W. A. Henson, Receiver of the Vicksburg Water Works Company, and Lelia Boykin, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States to be holden at Washington within 30 days from the date hereof, pursuant to an appeal filed in the Clerk's office of the United States Circuit Court of Appeals for the Fifth Circuit, wherein Mayor and Aldermen of the City of Vicksburg, a municipal corporation under the laws of the State of Mississippi, is appellant, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant as in the said petition for appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the United States this 15th day of April in the year of Our Lord one thousand nine hundred and thirteen.

DON A. PARDEE,

*Presiding Judge of the United States Circuit Court
 of Appeals for the Fifth Circuit.*

We, the undersigned solicitors of record for the appellees in the above entitled cause, hereby accept service of a copy of the above citation, and enter our appearance as solicitors for the appellees as aforesaid.

J. C. BRYSON, *Sol. for Appellees.*

HIRSH, DENT & LANDAU,

Sol. for Appellees.

[Endorsed:] In the United States Circuit Court of Appeals, Fifth Circuit. 2480. Mayor & Aldermen of the City of Vicksburg, Appellants, vs. W. A. Henson, Receiver, et al., Appellees. Citation. U. S. Circuit Court of Appeals. Filed Apr. 18, 1913. Frank H. Mortimer, Clerk.

Endorsed on cover: File No. 23,678. U. S. Circuit Court Appeals, 5th Circuit. Term No. 1103. Mayor and Aldermen of the City of Vicksburg, appellants, vs. W. A. Henson, receiver of the Vicksburg Water Works Company, and Lelia Boykin. Filed May 8th, 1913. File No. 23,678.

No. ~~1109~~ 546

MOTION TO ADVANCE HEARING

MAY 18 1918

JAMES H. MCKENNEY

SUPREME COURT OF THE UNITED STATES

MAYOR AND ALDERMEN OF THE CITY OF VICKSBURG,
Appellants.

Verus

W. A. HENSON, RECEIVER OF THE VICKSBURG
WATER WORKS COMPANY ET AL.,
Appellees.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

T. C. CATCHINGS,
GEORGE ANDERSON,
G. W. CATCHINGS,
Solicitors for Appellant.

Supreme Court of the United States.

MAYOR & ALDERMEN OF THE
CITY OF VICKSBURG
Appellants.

VERSUS

W. A. HENSON, RECEIVER OF THE
VICKSBURG WATER WORKS
COMPANY ET AL.,
Appellees.

APPEAL FROM THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIFTH CIRCUIT.

Motion to Advance Hearing.

TO THE

HONORABLE THE JUSTICES OF THE SUPREME COURT OF THE
UNITED STATES:

Comes now the appellant, the Mayor and Aldermen of the City of Vicksburg, by its counsel, T. C. Catchings, George Anderson and O. W. Catchings, and upon the attached affidavit of T. C. Catchings, one of said counsel, moves the Court to advance the hearing of the above entitled cause, for the reasons set forth in the said affidavit, and because, in the ordinary course, this cause cannot be heard for trial for two years at least, and because as the franchise granted by the appellant

on November 19th, 1886, under which the Vicksburg Water Works Company and the appellee, W. A. Henson, Receiver, claim, will expire on November 19th, 1916, the appellant after that time will have no source of water supply for itself and its inhabitants unless it is permitted to construct a waterworks system and have it ready for operation at the expiration of said franchise on November 19th, 1916; and because, if appellant is entitled as it verily believes, to construct a waterworks system for that purpose, it is essential that it should begin the work of construction at once, as it will require the whole or a large part of the time between now and the expiration of said franchise within which to issue bonds, make financial arrangements for the construction of said waterworks, and to have plans therefor prepared, and to have said work of construction carefully and economically carried on, and because appellant and its inhabitants will be left wholly without a source of water supply at the expiration of said franchise unless it is allowed in the meantime so to construct and have ready a system of waterworks. And to this end it is essential that the hearing of this cause shall be advanced.

T. C. CATCHINGS,
 GEORGE ANDERSON,
 O. W. CATCHINGS,
 Solicitors for Appellant.

STATE OF MISSISSIPPI }
 CITY OF VICKSBURG }

This day personally appeared before the undersigned authority, O. W. Catchings, who, on oath, said that on the 10th day of May, 1913, he handed to Messrs. J. C. Bryson and Hirsh, Dent & Laudan, solicitors for appellees, a true copy of the attached motion and affidavit.

O. W. CATCHINGS,

Subscribed and sworn to before me this 10th day of May,
 1913.

T. G. BIRCHETT, JR.,
 Notary Public.

SUPREME COURT OF THE UNITED STATES.

MAYOR & ALDERMEN OF THE
CITY OF VICKSBURG
Appellants.

VERSUS

W. A. HENSON, RECEIVER OF THE
VICKSBURG WATER WORKS
COMPANY ET AL.,
Appellees.

APPEAL FROM THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIFTH CIRCUIT.

Affidavit.

STATE OF MISSISSIPPI }
CITY OF VICKSBURG }

T. C. CATCHINGS, being duly sworn, deposed and said that he is of counsel for appellant in the above entitled cause; that he is informed by the Clerk of this Court that the said cause will not be heard for trial in the ordinary course under two years at least; that the said suit is based upon a bill in equity filed in the District Court of the United States for the Western Division of the Southern District of Mississippi by the appellees herein, wherein a decree was entered enjoining the appellant from constructing a waterworks system of its own, to be operated by it after November 19th, 1916; that on November 19th, 1886, the appellant granted a franchise which is now owned by the Vicksburg Water Works Company, of which W. A. Henson, one of the appellees, is Receiver, to run for thirty years, for the purpose of furnishing to the City of Vicksburg

and its inhabitants an adequate supply of water for public and private use; that said city is wholly dependent upon the waterworks system built in accordance with said grant for its supply of water, and that when said franchise shall have expired on the 19th day of November, 1916, it and its inhabitants will be wholly without a water supply unless it shall in the meantime build a waterworks system of its own; that early in the year 1912 said city declared its purpose to build a waterworks system of its own, to be operated after the expiration of said franchise and not in competition with the existing waterworks system, and to that end undertook to issue bonds to secure the requisite funds; that appellees thereupon filed their bill of complaint in this cause and procured the issuance of an injunction restraining the City of Vicksburg from issuing said bonds or from taking any steps whatsoever looking to the construction of a waterworks system until after the franchise shall have expired on November 19th, 1916; that a final decree was rendered by the District Court making this injunction perpetual, which, on appeal to the United States Circuit Court of Appeals for the Fifth Circuit, was affirmed by a divided court.

Affiant shows that he is informed and believes that at least three years will be required to issue bonds to secure the funds with which to construct a waterworks system, and to procure the preparation of proper plans and specifications therefor, to advertise for bids and let the contract therefor, and to actually complete the construction of a proper waterworks system, so that it may be in readiness to be operated upon the expiration of the franchise now held by the Vicksburg Water Works Company, on November 19th, 1916, as aforesaid.

Affiant shows that upon the expiration of said franchise the holder thereof will no longer be under obligation to furnish water, and that it is absolutely essential that the City of Vicksburg shall make preparation in order to insure its inhabitants a proper supply of water at that time.

Affiant shows that it is of the utmost importance that the question of its right to now commence the construction of such a system, to be operated after the expiration of said franchise,

shall be finally determined by this Court at the earliest possible moment, so that if this Court shall hold that it has that right it can take immediate steps to exercise it and prepare for the construction of a waterworks system as above set forth, and so that if it has not such right it may be so advised at the earliest possible moment, in order that some other arrangement shall be made, if possible, whereby its citizens shall be furnished with water upon the expiration of said franchise; that advancing this cause can work no possible harm to the appellee, and that they can be deprived of no right whatever by this cause being advanced.

Affiant shows that for the reasons set forth above, this cause involves a matter of very great public interest, to appellant, a municipal corporation of more than twenty thousand population, and to each one of its inhabitants.

Affiant shows that for it and its inhabitants to be deprived of a continuous supply of water for even a short period would amount to a calamity, for the reason that all of its public enterprises and public institutions, as well as its inhabitants, are absolutely dependent upon having at all times a supply of water; that sanitary conditions cannot be maintained without it, and that without a proper supply of water the entire city would have no protection from fire.

Affiant shows that said City of Vicksburg has suspended its entire work of paving its streets until its right to build a municipal waterworks system shall be determined, for the reason that it is considered unwise to lay any more street pavements until the water mains for its proposed system can be first laid, as otherwise the laying of mains would necessitate the tearing up of new street pavements.

Affiant says that said city now has lying idle a large sum of money which was procured by the issuance of bonds for street paving before it was enjoined from laying water mains to form part of a waterworks system to be owned by it, and that inasmuch as these funds cannot be used for any other purpose, it is important that its right to lay water mains be promptly determined, so that it may arrange its fiscal affairs accordingly.

Affiant further says that the decision of the District Court and of a majority of the Circuit Court of Appeals was based on what he verily believes to be an erroneous construction of the opinion of this court rendered in the case of Mayor and Aldermen of the City of Vicksburg vs. Vicksburg Water Works Company, 202 U. S. 453, and affiant refers to the case of El Paso Water Co. vs. the City of El Paso, 152 U. S., 157, as containing an express adjudication of the right of a city to build its own waterworks system to be operated after the expiration of a franchise similar to that here in question.

T. C. CATCHINGS.

Subscribed and sworn to before me this 10th day of May, 1913.

(Seal.)

T. G. BIRCHETT, JR.,

Notary Public.

3

IN THE
Supreme Court of the United States.

Office Supreme Court, U. S.
FILED.

MAY 26 1913

JAMES H. MCKENNEY,
CLERK.

MAYOR AND ALDERMEN OF THE CITY
OF VICKSBURG,

Appellant,

v.

W. A. HENSON, RECEIVER,

Appellee.

No. 546

ANSWER TO MOTION TO ADVANCE.

Appeal from United States Circuit Court of Appeals
for the Fifth Circuit.

J. C. BRYSON,

J. HIRSH,

HANNIS TAYLOR,

Counsel for Appellee,

W. A. HENSON, Receiver.

PRESS OF GIBSON BROTHERS

WASHINGTON, D. C.

1913

Supreme Court of the United States.

MAYOR AND ALDERMEN OF THE CITY OF
VICKSBURG, *Appellant*,

v.

W. A. HENSON, RECEIVER, *Appellee*.

No. 1103.

ANSWER OF W. A. HENSON, RECEIVER, APPELLEE, TO MOTION TO ADVANCE.

The controversy presented in this cause involves the right of the appellant to sell \$400,000.00 of bonds to raise funds to erect a system of water works.

W. A. Henson, Receiver of the Vicksburg Water Works Company, was complainant below and is appellee here, and the Mayor and Aldermen of the city of Vicksburg was defendant below and is appellant here.

The contentions set up by appellee will be found in his original bill (Rec., pp. 2-9), his amended and supplemental bill with exhibits thereto (Rec., pp. 49-74) and his supplemental bill (Rec., p. 81).

The principal relief prayed for by him in said bills is an injunction to restrain appellant, first, from building a water works during the life of the water works franchise under which he is operating (Rec., pp. 98-105) on the ground that said franchise precludes the city from so doing and has already been so adjudicated, and second,

from selling this particular issue of bonds on the ground that it was not legally authorized.

I.

Causes may be advanced for hearing under Sec. 949 of the U. S. Revised Statutes and under Rules 26 and 32 and not otherwise.

Neither appellant's motion nor the affidavit filed in support of it state whether the motion is predicated upon the statute or upon the rules.

This makes it necessary for us to show that it cannot be sustained under either.

As to the Statute.—This cause cannot be advanced under the terms of the statute for the reason that no "State is a party" and "the revenue laws of a state, the execution whereof is enjoined or stayed," are not involved.

The Mayor and Aldermen of the City of Vicksburg is a municipal corporation and not a State, and in considering this motion must be treated as an ordinary corporation. Such was the holding of the Court in *Davenport et al v. David Dows*, 15 Wall. 390, 21 Ed. 96, in which the Court said:

"This is a motion to advance the cause on the docket, and assign it specially for hearing. Prior to the act of June 30, 1870, the order of hearing causes was regulated by rule. Criminal cases and cases in which the United States are concerned, which also involve or affect some matter of general public interest, were advanced by leave of court, on motion of the attorney general. All other cases were required to be heard in their regular order, unless special and peculiar circumstances were shown in court."

"The reasons for preference do not apply to municipal corporations more than to railroads and many other corporations."

As to Rule 26.—Paragraphs 3, 4, 5 and 7 of this rule specify the cases which may be advanced.

Paragraph 3 has reference to criminal cases only, but this is not a criminal case.

Paragraph 4 has reference to second appeals, but this is not a second appeal.

The question of *res adjudicata* is averred as one of the predicates for the relief prayed for in this case but this does not make it a second appeal and it is not the only issue. The other predicates for relief have arisen since the termination of the suit set up as *res adjudicata* and are entirely new and independent of that question.

Paragraph 5 has reference solely to cases in which the United States is a party or is interested. The United States is not a part to nor interested in the case at bar.

In *Poindexter v. Greenhow*, Treas., 109 U. S., 63, this Court said:

"Paragraph 4 (now Par. 5) of rule 26 relates only to revenue cases in which the United States are concerned, which also involve or affect some matter of general public interest. Even these cannot be advanced, except in the discretion of the Court and on the motion of the Attorney General."

"The question involved may be of public importance, but that does not necessarily entitle the parties to a hearing in preference to others. Practically every case advanced postpones another that has been on the docket three years awaiting its turn in the regular call. Under these circumstances we deem it our duty not to take up a case out of its order except for *imperative reasons*."

Paragraph 7 provides:

"No other case will be taken up out of the order on the docket or be set down for any particular day

except under special and peculiar circumstances to be shown to the Court."

We have been able to find no opinion bearing specially on this particular paragraph or a case advanced under it, and yet this seems to be the only provision under which the instant cause could be advanced.

The facts disclosed by the record we submit fall neither within the letter nor the spirit of any of the provisions of Rule 26, nor of the adjudications of this court on the right to have causes advanced.

We quote from the Digest of the United States Supreme Court Reports, L. Ed., Vol. 1, entitled "Appeal and Error," pages 563 *et seq.*

Sec. 3786: "A case not entitled to be heard in advance of others will not, where one party objects, be advanced to be heard with another which has precedence on the docket."

Louisiana *ex rel* Southern Bank v. New Orleans, 103 U. S. 521.

Sec. 3787: "A cause which does not come within any of the exceptions to Rule 30, which requires causes to be heard in their order, although it involves important interests of a state, will not be advanced on the docket."

Baltimore & O. R. R. Co. v. Marshall County, 131 U. S. xcix Appx. and

Sec. 3788: "No cause can be taken up out of its order on the docket where private interests only are concerned. The only case where this rule does not apply are those in which the question in dispute will embarrass the government while it remains unsettled."

United States v. Fossatt, 21 How. 445.

Sec. 3792: "A Motion to advance a cause on the calendar is not within the Act of June 30, 1870, unless filed by the state or by a party claiming under its laws."

Ward v. Maryland, 12 Wall. 183.

Sec. 3793: "A suit in the name of the state, on the relation of an individual, is not within the act of Congress of June 30, 1870, giving priority to cases in which a state is a party."

Miller v. New York, 12 Wall. 159.

Sec. 3796: "This court will not give preference to cases in which the execution of the revenue laws of a state is enjoined, unless the operation of the state government will be embarrassed by the delay."

Hoge v. Richmond & D. R. Co., 93 U. S. 1.

Sec. 3797: "Cases in which the execution of the revenue laws of a state have been enjoined or stayed will only be advanced on motion of the state or the party claiming under such laws, who must show that the operation of the state government will be embarrassed by delay."

Kentucky C. R. Co. v. Bourbon County, 116 U. S. 538, 6 Sup. Ct. R. 601.

Mr. Taylor in his work on Jurisdiction and Procedure of the United States Supreme Court, page 644, says:

"In Davenport v. Dows, 15 Wall., 393, 21 L. Ed. 96, it was held that ordinances of municipal corporations levying taxes cannot be classed as revenue laws of a state, so as to give a right of preference in hearing a cause pending in the Supreme Court to any party claiming under such laws."

As to Rule 32.—This rule has reference solely to causes in which jurisdiction of the court below is the only issued

involved, but in the case at bar the jurisdiction of the District Court is not in any way involved and there are issues not jurisdictional involved. These facts exclude the case from the operation of Rule 32.

II.

The business and affairs of appellant, as disclosed by the record, do not demand exceeding haste or present any *imperative reason* for advancing the cause. It is averred as the principal ground for advancing the cause that :

"Appellant and its inhabitants will be left wholly without a source of water supply at the expiration of said franchise, unless it is allowed in the meantime to construct and have ready a system of water works."

This statement *entirely overlooks the fact* that appellant has an *option to purchase* the plant under appellee's control and that it can in this way *supply itself and its inhabitants* with water just as well as by *constructing* a plant.

That this may be made clear to the court we quote from Sec. 9 of the franchise (Rec., 103-104):

"At the expiration of each period of ten years after this ordinance takes effect the Mayor and Aldermen of the City of Vicksburg shall have the right and privilege to purchase the said water works, provided they notify the said Samuel R. Bullock & Company, their associates, successors or assigns of their intention so to do, at least one year before the expiration of said period of ten years.

"The value of the said system shall be ascertained as follows: The said Samuel R. Bullock and Company, their associates, successors or assigns, and the said Board of Mayor and Aldermen of the City of Vicksburg shall severally appoint one person, and the two

appointed shall choose a third, and the three persons thus chosen, who shall be hydraulic engineers, shall constitute a board to determine the values of said system of water works. None of the board shall be residents of the said Warren County. The said Mayor and Aldermen of the City of Vicksburg shall, within sixty days after the said Board have rendered its decision, pay the amount awarded in cash. A failure to so pay the award, or to give notice of intention to purchase, shall operate as a waiver of the right to purchase until the expiration of the next succeeding period of ten years."

To further advise the court of the true nature of the controversy between the parties and the attitude of appellant toward appellee, we next quote from appellee's amended and supplemental bill in this cause as follows (Rec., 59 *et seq.*):

"It (the appellant) next with some outward show of fairness made overtures to purchase the Water Company's plant, but even in this it was still unwilling to abide by the plain terms of the said franchise, in so far as the same required the price to be determined by hydraulic engineers who are by profession especially skilled in the valuation of such works, and insisted that lawyers, who are by profession and training wholly unskilled in such work, should be accepted as appraisers in valuing the property. When the Water Company had agreed to this substitution the defendant, still seeking to avoid its obligations to the Water Company and to deprive it of the benefit of its franchise and to acquire its water works system at a price under the just and true value thereof, insisted that the lawyer arbitrators in arriving at a valuation of the property should consider only the physical properties owned by the Water Company and should exclude the value of the remaining portion of the franchise. * * * The said proposition, as will

appear by inspection, is in the alternative, the first being:

"(a) Shall fix the true present worth of the value of the physical property of the Vicksburg Water Works Company considered as a going plant"

"(b) Shall in fixing the sum allow nothing for future earnings nor franchise value."

"And Second:

"(a) Shall disregard the above method in fixing the amount of their award."

"(b) Shall fix the true present value of the net earnings of the Vicksburg Water Works Company from _____ day of _____, 1911, to the 19th day of November, 1916."

"(c) Shall allow in addition the true present market value of the mains and other physical property of the company as if the franchise had expired, and without right to further operate its said plant."

"It will be observed that under the first alternative the value of the franchise is expressly excluded, and under the second the going value is left out, and in addition the second requires the physical properties to be valued as salvage or junk which they would be without the right to operate as a water works system. Following this effort on the part of defendant to set the Bullock franchise at naught and acquire the Water Company's plant without paying therefor true and just value, the defendant next offered to submit to the lawyer arbitrators to find merely the 'true market value' of the Water Company's properties, and when the Water Company in reply suggested that under certain decisions of the Supreme Court of Mississippi there was a high degree of uncertainty as to whether a water works system, not being the subject of market quotations and not being generally bought and sold in the markets of the country, possessed what is usually and technically known as 'market value,' but

that if defendant would agree that 'true market value' means 'due and just compensation' the Water Company would accept the offer. The defendant manifested its unwillingness to give such meaning to the words 'true market value' by making no reply. Thus baffled by its attempt to get advantage of the Water Company in a purchase by arbitration, the defendant next made overtures to purchase at private sale without resorting to arbitration as provided in said contract.

"The Water Company met this proposition in good faith, and after some parley, offered its property to the defendant, delivery to be made January 1st, 1913, at the sum of \$375,000.00, which offer it has kept open to the city to this date and still leaves the same open, though defendant has entirely ignored the same. The Water Company knew at the time it made the offer, and still knows, that its properties were and are reasonably and justly worth a great deal more than the price asked."

The foregoing averments are not denied by appellant and may therefore be taken as confessed by it. And it was testified to by witness Crumpler (Rec., p. 184).

It is further shown by said amended and supplemental bill, that the city can purchase at any time and not wait for the expiration of the franchise as therein provided. The averments in this regard are as follows (Rec., p. 73):

"Complainant avers that he with the sanction and consent of said Water Company now again offers what the said company has heretofore offered to do, to permit the said defendant to cause the said appraisement and purchase to be made without regard to the time mentioned in said contract, so that the said appraisement and purchase can be made at once, or at any time between now and the end of the franchise in the event this offer is accepted by the said defendant."

There are no reasons why the city should not buy in this way if it wants a plant.

As an evidence of the *adequacy and first class condition* of the said water works plant, extracts from the testimony of Mr. Jno. W. Alvord, a distinguished engineer of Chicago, Ill., are quoted (Rec., p. 178):

"That his study of the Vicksburg plant indicates that it is well designed in all its parts, and has been so built that further extension and enlargement will but slightly affect the values of the existing structures. This fact enables the plant to give first class service, and lessens the probability of losses from necessary replacement of structures due to inadequacy or other causes included in the contingent depreciation. The plant is well provided against emergencies, and except for a few minor faults which have been reckoned with in estimating the depreciation, it is capable of giving first class service for many years to come. This condition would tend to enhance the value of the present plant as the mistakes so liable to occur in the construction of new plants have been rectified, and future expense from these causes has been eliminated.

"That the witness in making said report reached this conclusion quite independent of the views of those connected with the Water Company and that it was his aim to reach a conclusion that would not be in the least different were he reporting to the city instead of the Water Company."

From the foregoing it appears that the city is *amply protected* and thoroughly provided with the means to meet all its duties and obligations in reference to furnishing its inhabitants with an *adequate supply of water* without resorting to the construction of a plant. Counsel for the city seem to *entirely overlook* the fact that this duty may be as well performed, and *perhaps better*, by a purchase of

appellee's plant as by constructing a new one. The right to have the *purchase price fixed by arbitration insures and protects the city against any exorbitant figure* and demonstrates that the city's contention that it—

"Will be left wholly without a source of water supply at the expiration of said franchise unless it is allowed in the meantime to construct and have ready a system of water works"

is utterly hollow and without merit.

Mr. Alvord further testified concerning the value of the plant (Rec., p. 176):

"That for the purpose of making such valuation he visited the city of Vicksburg and made an extended examination of the said plant and personally verified an inventory of the said properties which he had previously caused to be made by an employee from his office in order to determine the present fair value of the said water works system; that, from data thus gathered by him and his assistants, and verified by him, he estimated the cost of reproducing the plant under then existing conditions and the then existing normal cost of material and labor at \$444,299.00."

* * * (Rec., p. 177.)

"That he also considered the franchise owned by the company known as the 'Bullock Franchise' under which the said plant is being operated and has a right to continue to operate up to the 19th day of November, 1916, to be reasonably worth \$174,219.00 as of date, November 19, 1911, making a total valuation of the said properties on said date, \$618,518.00." (Italics ours.)

The city refused to pay \$375,000.00 for the property thus described and now appeals to this Court and in tears suggests that unless it is advanced and heard in preference to other causes long since on the docket appellant and its inhabitants must surely famish.

The testimony of the Witness Paxton (Rec., p. 153), Cashman (Rec., p. 172) and Crumpler (Rec., p. 182) abundantly demonstrates that the city was and is acting in bad faith and that it did not intend to build a water works with the proceeds of the said bonds even if they should be authorized and held valid, but on the contrary that it contemplated using the power thus given it as a weapon to beat down the owners of the plant in appellee's charge in their selling price and to acquire their works at a price materially under its true value. The city's action toward the Water Company was equivalent to its saying, "Sell me your water works at a price I shall name or I will build new works and utterly destroy the value of yours."

The witness Cashman said in this connection (Rec., p. 173):

"That Ben H. Stein, a member of the Board of Mayor and Aldermen of the City of Vicksburg, Mississippi in a conversation had with witness and witness's father, had said they were going to try to pass the bond issue to be used as a kind of big stick to hold over the water works, and didn't really intend the water works to be built."

Witness Crumpler (Rec., pp. 196 *et seq.*) testified:

"That he was present at a meeting of the Board of Mayor and Aldermen held on the 9th day of October, 1911, and heard the reading of the water committee report advising a bond election and also heard the reading of a letter from the Mayor of Helena, Montana, to Aldermen Harding, and that he listened to the debate upon these papers and upon what action the city should take in reference to voting bonds to build a new water works. In this connection he said: 'I remember distinctly at that session, one of the Aldermen, Mr. Stein, read a goodly portion of the

Helena letter which Mr. Harding had received from the Mayor, and in commenting on the situation he said, that the situation at Helena had been the same as in Vicksburg in the fight with the Water Works Company and was an example for Vicksburg to follow. Mr. Stein further said that the letter showed the wonderful change which came about on the part of the Water Works Company at Helena in its efforts to sell when it found out that the city would really build its own plant. The original offer to sell to the city of Helena was \$1,386,000 and this was finally lowered to \$400,000.00 when a bond issue had been issued and Helena was ready to build its own plant.

"Mr. P. M. Harding at the same meeting, in speaking on the same subject read the entire letter which he had received from the Mayor of Helena, and commenting on the matter said: 'The fight on the Water Company at Vicksburg was of the same kind at Helena, long and continuous, and that it was an example for Vicksburg to follow' or words to that effect. Alderman Harding further referred to the Helena situation and said that he thought the only method to get a reasonable proposition from a Water Company, as they are all more or less alike, is to show a real business-like determination for the city to help itself as Helena did, and that the water man suddenly realizes that his plant is not near so valuable as he at first thought it to be. I will state that at that meeting Alderman Montgomery said he wanted to submit the election so the voters could vote either to buy the present plant or build one and Mr. Brunini, the attorney for the city shook his head at Alderman Montgomery. Alderman Montgomery replied, 'You need not shake your head at me, for I am not going to vote until I understand it.' Then Alderman Montgomery asked Mr. Brunini the question, if the bond election was carried to build, if these bonds could be used to buy the present plant, and Mr. Brunini said to him 'No.' Alderman Montgomery then said to Mr. Brunini, 'Well, then, how is it?' Mr. Brunini then said, that

'if the election was carried to build, if the water company will then come down to what we think is a proper price for its works, then another election can be called to issue bonds for that plant.' Alderman Montgomery said: 'Oh, is that the way of it?' The motion to build a water works was then submitted and carried—and Alderman Montgomery voted for it."

When asked whether or not the Helena letter and the Dabney circular had any effect on the election, the witness said (Rec., p. 197):

"Yes, sir, the Helena letter was published in the *Herald* on the second day following its reading by the board of Mayor and Aldermen and afterwards in the Dabney circular. These publications had wide circulation and I think undoubtedly they had large influence and these and the talk that the city did not intend to build any way, changed the general impression and thought and most everybody got into the band wagon, so to speak, with that idea in view. I think there was no question but that kind of literature and talk changed the election entirely from what the sentiment was at the beginning of the campaign.

"After the bond election had been carried and from that time to this the city has done nothing towards the construction of a new plant or in advertising or selling the bonds. On the contrary, it has made repeated efforts to deal with the Water Company on a sale of its property, and after considerable negotiation made an offer of \$340,000 for the Water Company's plant.

"One of the Aldermen, Mr. Ben H. Stein, a short time after the election said to me, that they, meaning the City Council, knew that the promise was made that the city did not intend to build during the election, hung over them like a mill stone. * * * (Rec., p. 199):

"I will state further, that the talk, during the bond election, to the effect that the city did not intend to build, that they wanted the bond election carried, so as to make the Water Company come down in its price, and especially the publication of the Helena letter as a criterion and example to force the Water Company to reduce its price, was a gross fraud and deception, and under this guise the voters were largely voting for one thing while they wanted another, so that the real wishes and desires of the voters were not obtained at the ballot boxes."

City Clerk Paxton testified in substance (Rec., p. 153) that the city had published and mailed to the qualified voters shortly before the said election a pamphlet and other matter at a cost of \$129, which amount had been actually paid out of the city's funds; that the pamphlet on the front outside page contained the following:

"A careful reading of the pamphlet's contents will enable you to vote intelligently on the bond issue in question on February 14th, 1912."

That in addition it contained on the first and second second pages inside the cover the following (Rec., p. 153):

"To this end an election has been called for the purpose of securing the consent of the voters to a bond issue. Should the bond issue be authorized, the city will build its water works system unless the Vicksburg Water Works Company shall offer its present plant at a price deemed reasonable by the Mayor and Aldermen. If this shall be done a new election will be held to determine whether or not the people of Vicksburg wish to purchase at the price deemed reasonable by the Mayor and Aldermen."

Witness Paxton further testified (Rec., p. 160), that the letter from Helena, Montana, to Alderman Harding which

was read at a council meeting of the city of Vicksburg, among other things contained the following (Rec., p. 160):

"Three years ago the city awarded a contract for the construction of a new plant, and sold the necessary bonds. This was followed by the issuance of an injunction, and our highest court held that our procedure was irregular. Last January another election was held for the purpose of bonding the city for \$650,000, and was carried by a large affirmative vote. Following this election the Council advertised for bids for the construction of a new plant, and also advertised for bonds for sale. Within a week of the time fixed for awarding contract and selling bonds, the Water Company presented an offer to sell its property for the sum of \$400,000. This proposition was voted upon and accepted on June 26th, and we are now advertising the bond sale.

"If your city is desirous of purchasing the existing plant at anything like a fair price, it is quite likely that it will be necessary for you to lay out plans and begin negotiations for a new and independent plant."

The foregoing excerpt from the testimony is *unchallenged*. The city offered no witness to refute the same or any part of it.

The representations on the part of the city as disclosed above were necessarily fraudulent and corrupting in effect and in the nature of a *bribe to the tax-paying voters*.

This merely shows the *bad faith* of the city and the *utter insincerity* of its present representations and that it is in no way entitled to have the case advanced out of sympathy or preference.

So far as concerns the paving of streets the record does not show that the city's hands are tied or that the city may not pave any street it desires. However, appellant has attempted to show to the contrary by an affidavit attached to its motion to advance.

In this connection we reluctantly call attention to a statement in the affidavit at the bottom of page 5 of the motion as follows:

"That said city now has lying idle a large sum of money which was procured by the issuance of bonds for paving streets."

This statement is grossly erroneous and we fear, if left unexplained, is liable to mislead the Court. We have taken the pains to prepare an exact statement of the paving fund referred to from the city's records and herewith append the same as Exhibit "A." The exact balance on hand of the fund in question on the day the appellant's affidavit was made was \$752.48. This pittance was all the funds in the treasury of said city on said date with which to pave streets or to meet its ordinary current expenses. With due deference to counsel we submit that it is altogether absurd to designate this as "a large sum of money." But even this small sum was not *idle* as it was drawing $4\frac{1}{2}$ per cent annually, payable monthly.

The laying of water mains is not essential to the paving of a street as stated in the affidavit attached to appellant's motion. The only damage that could result would be the additional cost of going through the pavement to lay the mains, and since the city does not propose to use the mains until the expiration of the present franchise it would necessarily lose interest upon the money invested in them from the time they were laid until the franchise terminated.

It does not appear that this loss would not exceed the extra cost of laying mains under the paved streets, and, to say the least, it is not established that the city would be benefited by laying such mains now.

III.

Since the affidavit to appellant's motion to advance directs attention to the case of Mayor and Aldermen of Vicksburg v. Vicksburg Water Works Company, 202 U. S., p. 453, as having controlled the District Court and also the Circuit Court of Appeals in deciding the cause at bar and suggests that the case of El Paso Water Company v. City of El Paso 152, U. S., 157, should have controlled, we think it pertinent to call the Court's attention to the record of the former case which is embodied in the record now before the Court and to discuss the cases and point out the reasons why the El Paso case is not controlling.

The prayer in the original bill in the Vicksburg case above referred to (202 U. S., 453) was as follows (Rec., p. 119):

"That the defendant may be enjoined perpetually from assuming to abrogate, and take away the franchise and contract rights of complainant, and from endeavoring to disable complainant from carrying on its business *and to destroy its credit and the value of its property and coerce said complainant to sell its water works to defendant for an inadequate price*, and that defendant may be enjoined and restrained from otherwise carrying on the unlawful conspiracy aforesaid entered into by it, and from doing any other illegal and unlawful act in furtherance of said unlawful conspiracy, and that said act of the legislature of Mississippi, adopted on the 9th day of March, 1900, and on the 7th day of November, 1900, be decreed to impair the obligations of said contract between said city and the said Bullock & Co., and their assigns, and to cast a cloud upon the title, franchise and rights of complainant and to be invalid, and of no effect as against your orator." (Italics ours.)

The prayer in the amended and supplemental bill of complainant in said Vicksburg case contained the following (Rec., p. 26):

"That the Honorable Court will enjoin the defendant from issuing and selling said bonds for the purpose of building and constructing water works of its own in competition with your orator, *and in addition thereto* that this Honorable Court will decree said act, resolution and election to be invalid and unconstitutional, *and that the defendant be precluded and restrained and enjoined from constructing water works of its own in said city until the expiration of your orator's contract.*" (Italics ours.)

The then Circuit Court granted the relief prayed for and an appeal was prosecuted to this court, the case being entitled *Vicksburg v. Vicksburg Water Works Company*, 202 U. S. p. 453. In deciding this case the Court said:

"The decree in the court below was in favor of the Vicksburg Water Works Company enjoining the city DURING THE PERIOD OF THE CONTRACT FROM CONSTRUCTING A WATERWORKS SYSTEM OF ITS OWN."
* * *

"The assignments of error necessary to be considered are,

"1st, * * *

"2d. The enforcing the contract of the city in favor of the complainant and restraining the city from building a water works of its own during the TIME COVERED BY THE CONTRACT WITH COMPLAINANT" (Rec., p. 208). (Capitals ours.)

The opinion concluded as follows (Rec., p. 148):

"We find no error in the decree of the Circuit Court enforcing the contract rights of the complainant

enjoining the city from erecting its own water works during the term of the contract—affirmed.” (Italics ours.)

This Court sustained the decree of the lower court (except as to the granting of a mandatory injunction relating to the sewer mentioned in the decree) and on the 5th day of June, 1906, it issued its mandate, commanding, among other things, the following (Rec. p. 134):

“Fifth; That the said defendant *refrain from constructing water works of its own until the expiration of the period prescribed in the said ordinance, contract and franchise dated 18th day of November, 1886.*” (Italics ours.)

In the instant case the Court below being of the opinion that the decree and mandate of the case just quoted from (203 U. S. 453) controlled this, accordingly decreed (Rec., p. 205):

“That the complainant, W. A. Henson, Receiver, is entitled to the relief prayed for by him, and that the motion for the preliminary injunction be sustained, and that the Mayor & Aldermen of the city of Vicksburg be and the same are hereby enjoined and restrained from building or constructing a system of water works, or any part thereof, within said city until after the 19th day of Nov. 1916, the date of the termination of the franchise granted by defendant to Samuel R. Bullock & Co. on Nov. 18th, 1886, which franchise is now owned by the Vicksburg Water Works Co. and under which the said waterworks are now being operated by complainant, W. A. Henson, Receiver.”

This decree was, on appeal to the Circuit Court of Appeals for the Fifth Circuit, affirmed in all respects, and the appellant now brings the case to this court for final review.

The case of El Paso Water Company v. El Paso, 152 U. S. 157, was pressed upon the District Court and also upon the Circuit Court of Appeals, and is now brought to the attention of this Court by the affidavit attached to the motion.

It is apparent that the franchise in the El Paso case, which is set forth in full as Exhibit "B" hereto, did not reserve to the city of El Paso the *option of purchasing* the water works system, either by arbitration, as the Vicksburg franchise does, or by condemnation, as the Walla Walla franchise did (172 U. S., p. 1). In the Walla Walla case this court held that the city of Walla Walla could not build water works before the termination of the Water Company's franchise because it had agreed not to, and in the Vicksburg case, 202 U. S. 453, it *held that the Walla Walla case controlled the latter* and that the city of Vicksburg could *not build water works until after the expiration of the franchise* because it had given an exclusive franchise to *erect water works during the life of the franchise*.

In addition no exclusive right could be granted, either under the Constitution or Laws of the State of Texas, or under the decisions of the Supreme Court of Texas. There was no *adjudication* in the El Paso case because the Court decided it did not have *jurisdiction*.

It is further to be noted that the El Paso case was decided March 5, 1894, and the Vicksburg case May 1, 1906, over twelve years thereafter. The Walla Walla case had been decided between these two periods and the *Vicksburg case was held to be controlled by this* and not by the El Paso case.

The Vicksburg case (202 U. S. 453) was carefully considered, the meaning of the term "exclusive" in the franchise was raised and considered and properly defined; and after a full argument, with both the questions of a com-

peting and non-competing plant raised, and with Justice Harlan dissenting, the conclusion was reached and the decree entered precluding the appellant from building water works prior to the end of the franchise as hereinbefore stated. The court below and the Court of Appeals simply followed this holding.

We therefore submit that this case is not made by law a preference case and that there is no equitable ground for its advancement.

Respectfully submitted.

J. C. BRYSON,

J. HIRSH,

HANNIS TAYLOR,

Counsel for Appellee.

W. A. HENSEN, *Receiver.*

EXHIBIT A

STATE OF MISSISSIPPI,)
 County of Warren,)
 City of Vicksburg.)

Personally appeared before the undersigned, a Notary Public in and for said city, J. C. Bryson, who, being by me sworn, deposed and said:

That he is of counsel for the appellee, W. A. Henson, Receiver, and that he has read appellant's motion to advance and the affidavit of the Hon. T. C. Catchings filed as an exhibit thereto; that he has also examined the public records of the Mayor and Aldermen of the city of Vicksburg showing the receipts and disbursements made by the said city and finds that the said records do not support and are not in accord with so much and such parts of the said affidavit by the said Catchings as is in words and figures as follows, to wit:

"Affiant says that the said city now has lying idle a large sum of money which was procured by the issuance of bonds for street paving before it was enjoined from laying water mains to form part of the water works system to be owned by it, and that inasmuch as these funds cannot be used for any other purpose, it is important that its right to lay water mains be promptly determined, so that it may arrange its fiscal affairs accordingly."

This affiant now states the true facts as disclosed by the said records to be as follows:

That the said appellant did, in November, 1912, sell an issue of \$100,000.00 of paving bonds and received therefor

\$103,988 89

That it deposited this fund at $4\frac{1}{2}\%$ per annum interest, payable monthly, with one of the local banks and has since collected thereon interest as follows:

Int. for November, 1912	\$207 70	
" " December, 1912	233 61	
" " January, 1913	181 44	
" " February, 1913	55 38	
" " March, 1913	52 35	
" " April, 1913	50 86	
		781 34
Total		\$104,770 23

That it has paid out and disbursed from said fund the following, to wit:

Paving Grove Street	\$18,161 32	
Paving Belmont Street	8,455 37	
Paving Bomar Avenue	8,035 82	
Paving Baum Street	4,705 19	
Paving Washington Street	5,014 77	
		44,372 47
Balance		\$60,397 76

That of this, the said appellant, in the month of January, 1913, transferred to its general fund the sum of \$16,000.00 and in the month of February, following, the sum of \$35,000.00, and disbursed the same in the payment of current expenses, leaving a balance of \$9,397.76 out of which it paid out between the 1st and 10th of May, 1913, on current expenses the sum of \$8,645.28, leaving a balance of \$752.48, which was the exact sum to the credit of said account on May 10, 1913, the day the affidavit of the said T. C. Catchings was made.

That this balance was the only fund then on hand with which the appellant city had to meet its current expenses or to invest in paving or any other public improvement.

Affiant further says that the restraining order precluding appellant from laying water mains was signed December 27, 1912, and that the contract to pave Washington Street above referred to was made on February 7, 1913, and did not provide for the laying of water mains under the said pavement, and the said pavement has since been laid and paved for as above shown and no water main has been laid thereunder by the said appellant.

J. C. BRYSON.

Sworn to and subscribed before me this 21st day of May, 1913.

G. W. McCABE,
Notary Public.

[SEAL]

EXHIBIT B.

FRANCHISE OF EL PASO WATER COMPANY.

MAYOR'S OFFICE, *May 7th, 1881.*

Called meeting of the City Council at above place and date. Present: Aldermen Ochoa, Hague, Krakauer and Hart; also City Attorney Coldwell, City Marshal Stoude-

mire, City Engineer Hart and M. W. Carrico Clerk.
Absent: Mayor Schutz, Aldermen Magoffin and Slade.

Mayor Schutz being absent, Mr. John Ochoa took the chair as Mayor *pro tem*.

The following ordinance was then read and on motion adopted, *viz.*: "AN ORDINANCE GRANTING CERTAIN PRIVILEGES TO THE EL PASO WATER COMPANY."

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF EL PASO:

Section 1. The El Paso Water Company shall have the sole and exclusive right, warrant and authority to manufacture, sell and furnish water to the inhabitants of the city of El Paso to both public and private buildings and for irrigation within the corporate limits of the said city of El Paso.

Section 2. The said company shall have the sole and exclusive right, warrant and authority to lay pipes, mains and conductors underneath the streets, alleys, lanes and squares in the city of El Paso for the purpose of conducting water.

Section 3. The right, warrant and authority above mentioned and granted shall continue for the period of fifteen years.

Section 4. If the said El Paso Water Company shall fail or refuse to furnish as soon as practicable to the inhabitants of the city of El Paso and to the public buildings, both state, county and municipal and private houses therein, a sufficient quantity of pure water for all convenient and necessary domestic purposes or shall demand for the water furnished the public buildings as aforesaid more than the cost price thereof, then the right, warrant and authority herein granted shall be forfeited.

Section 5. Nothing herein contained shall be held to

take away, limit or impair any public or private right under the ascequia system.

Section 6. This ordinance shall take effect from and after its passage.

Section 7. The clerk is hereby directed to furnish the said El Paso Water Company with a copy of this ordinance.

STATE OF TEXAS,
County and City of El Paso.

I, C. W. Fassett, City Clerk in and for the city of El Paso, Texas, do hereby certify that the above and foregoing is a true, full and correct copy of the records of the City Council pertaining to an ordinance granting certain privileges to the El Paso Water Company, at a meeting held on May 7, 1881, and of record in Minute Book "B," pages 114, 115, 116 of the Records of the City Council of El Paso, Texas; which records do not show the ordinance as having been signed by the Mayor and City Clerk; neither do the minutes of said date show signature of the Mayor nor attest of the City Clerk.

Given under my hand and official seal this 14th day of January, A. D. 1913.

C. W. FASSETT,
City Clerk in and for the City of El Paso, Texas.

Office Supreme Court, U. S.
FILED.

SEP 22 1913

JAMES W. MCKENNEY,
CLERK.

Supreme Court of the United States,

OCTOBER TERM, 1913.

No. 546.

MAYOR and ALDERMEN of the City of Vicksburg,
Appellants,

against

W. A. HENSON, Receiver of the Vicksburg Water Works
Company and LELIA BOYKIN,
Appellees.

MOTION TO DISMISS APPEAL.

J. C. BRYSON,
JOSEPH HIRSH,
EDGAR H. FARRAR,
Counsel for Appelles,

Supreme Court of the United States,

OCTOBER TERM, 1913.

No. 546.

MAYOR AND ALDERMEN OF THE
CITY OF VICKSBURG,
Appellants,

against

W. A. HENSON, Receiver of the
Vicksburg Water Works Com-
pany, and Lelia Boykin,
Appellees.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF AP- PEALS FOR THE FIFTH CIRCUIT.

Motion to Dismiss Appeal.

To the Honorable the Chief Justice and the Asso-
ciate Justices of the Supreme Court of the
United States:

Now come the Appellees and move that the ap-
peal herein taken to this Honorable Court by the
Mayor and Aldermen of the City of Vicksburg, be

dismissed out of this Court for the following reasons, to-wit:

First.—Because the decree entered in this cause in the District Court, from which an appeal was prosecuted to the Circuit Court of Appeals, and from whose decision affirming said decree this appeal is now sought to be prosecuted to this Court, is not a final decree disposing of the whole case from which an appeal will lie.

Second.—Because, if the said decree is a final decree from which an appeal will lie, then the decree on said appeal by the United States Circuit Court of Appeals is final in that court, and no appeal from said decree will lie to this Court.

WHEREFORE, petitioners pray that the appeal herein be dismissed out of this Court with costs.

J. C. BRYSON,
JOSEPH HIRSH,
EDGAR H. FARRAR,
Counsel for Appellees.

5

Office Supreme Court, U. S.
FILED.

SEP 22 1913

JAMES H. MCKENNEY,
CLERK.

Supreme Court of the United States,

OCTOBER TERM, 1913.

No. 546.

MAYOR and ALDERMEN of the City of Vicksburg,
Appellants,

against

W. A. HENSON, Reeiver of the Vicksburg Water Works
Company and LELIA BOYKIN,
Appellees.

BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL.

J. C. BRYSON,
JOSEPH HIRSH,
EDGAR H. FARRAR,
Counsel for Appelles,



IN THE
Supreme Court of the United States

OCTOBER TERM, 1913.

No. 546.

MAYOR AND ALDERMEN OF THE CITY OF VICKSBURG,
Appellants,

against

W. A. HENSON, RECEIVER OF THE VICKSBURG WATER
WORKS COMPANY, AND LELIA BOTKIN, *Appellees.*

SUBJECT INDEX.

	Page
Statement of facts	1 to 15
Motion to dismiss on two grounds:	
First Because the decree in the District Court is not final	15
Second. Because if the said decree is final in the District Court, then the decree of the Circuit Court of Appeals is final and no appeal lies to this Court	15

LIST OF CITATIONS.

Bostwick v. Brinkerhoff, 16 Otto 3, 27 L. Ed., 73 . . .	17
Bolles v. Outing Co., 175 U. S., 262; 44 L. Ed., 156. .	24
Bagley v. General Fire Extinguisher Co., 212 U. S., 447; 53 L. Ed., 605	28
Borgmeyer v. Idler, <i>et al.</i> , 159 U. S., 408; 40, L. Ed., 199	27
Crawford v. Haller, 111 U. S., 796; L. Ed., 602	25
City of Paducah v. East Tenn. Telephone Co., 228 U. S.	18
Craighead, <i>et al.</i> , v. Wilson, 18 Howard, 199; 15 L. Ed., 332	17
Covington v. First National Bank of Covington, 185 U. S., 270; 46 L. Ed., 906	19
Colorado Central, etc., R. Co. v. Turk, 150 U. S., 138 37 L. Ed., 1030	27
Dainese v. Kendall, 119 U. S., 53; 30 L. Ed., 305 . . .	18
<i>Ex Parte</i> Jno. H. Russell, 13 Wall., 664; 20 L. Ed., 632	24
<i>Ex Parte</i> Parker, 126 U. S., 737	25
<i>Ex Parte</i> Chas. F. Jones, 164 U. S., 691; 41 L. Ed., 601	28
Green v. Fisk, <i>et al.</i> , 13 Otto, 518; 26 L. Ed., 485 . . .	17
Gableman v. Peoria D. & R. Co., 179 U. S., 335; 45 L. Ed., 220	33
Grant v. Phoenix Fire Ins. Co., <i>et al.</i> , 16 Otto, 429; 27 L. Ed., 237	18
Greave v. Sentell, 153 U. S., 465; 38 L. Ed., 38 . . .	24
Huguley Mfg. Co. v. Galleton Cotton Mills, 184 U. S., 209; 46 L. Ed., 546	28
In London v. Taxing District, etc., 14 Otto, 771; 26 L. Ed., 993	23
Keystone, etc., Co. v. Martin, 132 U. S., 91; 33 L. Ed., 275	19
Leather Manufacturers' National Bank v. Cooper, 120 U. S., 778; 30 L. Ed., 816	31

Index—Continued.

iii

London v. Taxing District, 104 U. S., 771; 26 L. Ed., 923	24
Louis Loeb v. Trustees Columbia Township, 179 U. S., 472; 45 L. Ed., 280	28
Martin, <i>et al.</i> , v. Northern Transportation Co., 79 U. S., 4; 20 L. Ed., 251	24
McGourkey v. Toledo & Ohio Central Railway Company, 146 U. S., 536; 36 L. Ed., 1079	19
Mt. Pleasant, <i>et al.</i> , v. Chas. Beckwith, 100 U. S., 514; 25 L. Ed., 699	24
Metcalf v. City of Watertown, 128 U. S., 586; 32 L. Ed., 543	32
New Orleans v. Bayousara Mail Co. v. Fernandez, 79 U. S., 1; 20 L. Ed., 249	24
Provident Sav. L. Assur. Society v. Ford, 114 U. S., 635; 29 L. Ed., 261	30
Press Publishing Co. v. Harriett Monroe, 164 U. S., 105; 41 L. Ed., 367	28
Rexford v. Brunswick-Balke-Collender Co., 228 U. S., 339	18
<i>Re</i> Parker, 131 U. S., 221; 33 L. Ed., 123	25
St. Louis, etc., & R. Co. v. Southern Express Co., 108 U. S., 24; 27 L. Ed., 638	18
Spreckles Sugar Ref. Co. v. McLain, 192 U. S., 397; 48 L. Ed., 496	28
St. Louis K. C. & C. R. Co. v. Wabash R. Co., <i>et al.</i> , 217 U. S., 247; 54 L. Ed., 752	28
St. Louis K. C. C. R. Co. v. Wabash R. Co., <i>et al.</i> , 217 U. S., 247; 54 L. Ed., 572	34
Third St. & S. R. Co. v. Lewis, 173 U. S., 457; 43 L. Ed., 766	34
Thomas v. Wollridge, <i>et al.</i> , 23 Wall., 283; 23 L. Ed., 135	21
Third Street & S. R. Co. v. Lewis, 173 U. S., 457; 43 L. Ed., 766	28
United States v. Blackfeather, 155 U. S., 180; 39 L. Ed., 114	24

Supreme Court of the United States,

OCTOBER TERM, 1913.

No. 546.

MAYOR AND ALDERMEN OF THE
CITY OF VICKSBURG,
Appellants,

against

W. A. HENSON, Receiver of the
Vicksburg Water Works Com-
pany and Lelia Boykin,
Appellees.

BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL.

Statement of Case.

The issues are made up in this case in an original bill, filed March 2, 1912 (R., pp. 2-9), a supplemental and amended bill filed May 6, 1912 (R., pp. 49-74), a second supplemental bill filed December 27, 1912 (R., pp. 81-83), and an intervention by Lelia Boykin joining the complainant, filed July 1, 1912 (R., pp. 89-90).

The original bill was answered April 1, 1912 (by error in printed record, p. 23, given as April 1, 1913).

The first supplemental and amended bill was answered July 1, 1912 (R., pp. 75-79), and the case was then put at issue on the original and first supplemental bills and the answers thereto by a replication filed August 13, 1912.

In the original bill, the complainant as a citizen of the State of Tennessee, brings his bill against the defendant municipal corporation as a citizen of the State of Mississippi, in his capacity as Receiver of the Vicksburg Water Works Company.

He avers that he was appointed Receiver of the said Company by a decree of the United States District Court of the same district in which he exhibits his bill; that he has qualified as such Receiver and as such holds possession and control of all the property of such company and has absolute charge of the business and affairs thereof; that all of the property of said company is situated in the City of Vicksburg and is assessed for municipal taxes at that time and will continue to be so assessed in the future; that for that reason he is a taxpayer of said city and as such is entitled to all the rights, privileges and benefits accruing and appertaining to such; that among the properties owned by the company of which he is Receiver, is a certain franchise granted by an ordinance of the City of Vicksburg in November 18, 1886, giving "the exclusive right and privilege for the period of thirty years from the time the ordinance takes effect, of erecting, maintaining and operating a system of water works in accordance with the terms and provisions of the ordinance, and of using the streets, alleys, public squares and all other public places within the cor-

porate limits of the City of Vicksburg * * * for the purpose of laying pipes, mains and other conduits, and erecting hydrants and other apparatus for the conducting and furnishing an adequate supply of good wholesome water to the City of Vicksburg and to the inhabitants for public and private use"; that after the grant was made and accepted and had been acquired by the Vicksburg Water Works Company, the City of Vicksburg in the year 1900, undertook to abandon said contract and free itself from its obligations, and to that end procured the passage of an Act by the Mississippi Legislature, authorizing and empowering it to build, own and operate a water works of its own, and thereafter by resolution of the Board of Aldermen, denied any and all obligations to the Vicksburg Water Works Company, who thereupon filed a bill in the United States Circuit Court for this District praying for an injunction to restrain said city from impairing the obligations imposed by said contract, and in said cause obtained a final decree declaring the said franchise and contract legal and valid, perpetually enjoining the defendant from infringing, ignoring, rescinding or denying liability under said ordinance, contract and franchise, in any of its parts, and enjoining defendant "from constructing water works of its own until the expiration of the period prescribed in said ordinance, contract and franchise, dated the 16th of November, 1886"; that the city prosecuted an appeal from said decree to the Supreme Court of the United States, which Court affirmed said decree; that notwithstanding said decree and the affirmance thereof, the defendant has continuously sought some means of freeing itself of the obli-

gations of said contract, and of owning and operating a water works of its own, and to that end has frequently made overtures for the purchase of complainant's plant and the company has made divers offers of sale of its property and business, none of which offers have been accepted, and that defendant seeks to purchase said property at a price grossly under its true value.

The complainant further avers that on January 1, 1912, the defendant passed a resolution declaring its purpose and intention of constructing a water plant of its own and to that end to issue bonds to the extent of \$400,000 to be sold for the purpose of raising funds for the construction of such plant, *said plant, however, not to be operated until after the expiration of complainant's franchise*; that said resolution further provided for the calling of an election to authorize the issuance of said bonds, the same to be held on February 14, 1912; that on said date said election was held, and the defendant, on February 15th, declared by an ordinance that said bond issue had been adopted and that said city was authorized and empowered to execute and sell the same.

Complainant further avers that if said bonds should be issued and sold, he, as a taxpayer, will be compelled and required to pay a part thereof, and to pay annually a part of the interest on said bonds by way of taxes on its property, and that in addition thereto the property of the complainant will be greatly depreciated in value by the issuance and sale of said bonds, and also by the construction of another water works plant in the City of Vicksburg during the pendency of its franchise.

Complainant further avers that, even if the city should elect to construct a water works of its own and have the same ready for operation at the expiration of complainant's franchise, there is no necessity for commencing at so early a date; that the time required for the construction of such a plant is not exceeding eighteen (18) months, and yet the city is seeking to float bonds for the construction of the same at a period of more than fifty months before it would be authorized to operate said plant; that complainant and other taxpayers will, in the meantime, be required to pay taxes on said bonds, and the plant, if constructed, will be lying idle and constantly diminishing in value; that the real purpose of the city in seeking to negotiate and sell the bonds at the present time is not to construct a water plant for the city, but for the purpose of depreciating the value of the plant now owned by complainant, so that defendant may be able to purchase the property at a vile price and thereby defraud the water company and its bondholders of a large sum.

Complainant further avers that under the circumstances, the calling of said election at said time for the purpose mentioned is a violation of the injunction of this Court in the final decree above set forth, in the litigation between the defendant and the Vicksburg Water Works Company, represented by the complainant as Receiver; that said defendant city, its Mayor and Aldermen, are each and all severally in contempt of this Court in calling and holding said election and in seeking to issue said bonds at this time for the purpose aforesaid; and that complainant is entitled to have each and all of them cited as

for contempt of this Court; and to have the said bond election declared void and held for nought.

Complainant then avers that even if defendant had the right to call the election and to issue the bonds, it was bound in proceeding to that end to comply with its charter and ordinances and the laws of the State of Mississippi pertaining thereto.

The complainant then sets forth the terms of the charter of the City of Vicksburg, which provides that before providing for the issuance of any bonds the Mayor and Aldermen shall publish notice of the purpose to issue the same, in a local newspaper for three weeks next preceding; and if within that time twenty (20) per cent. of the adult taxpayers of the municipality shall petition against the issuance of the bonds, then the bonds shall not be issued unless authorized by a majority of the electors voting in any election to be ordered for that purpose.

The complainant then avers that these provisions of the charter were ignored and violated, and that for that reason the city was without power or authority to issue the said bonds under the election as held.

It is further averred that the amount involved in the suit, exclusive of interest and costs, exceeds \$3,000.

The prayer is for an immediate restraining order against the defendant, requiring it to desist from any further action looking to the issuance and sale of said bonds under the said election, and on final hearing, for a decree declaring the action of the said defendant city in calling and holding the said bond election, void and of no effect, and for an injunction perpetually re-

straining the city from issuing the said bonds or taking any further action to that end by virtue of said pretended election; and also for general relief.

The defendant filed to this original bill, a long argumentative answer in which the substantial averments of the bill were admitted.

The defenses set up are:

1st. That complainant, as a taxpayer, will not be affected by the issuance of the bonds, because, for the reasons given, the issuance thereof cannot increase either the assessment or the rate of taxation of complainant.

2nd. That complainant actively participated in the election to determine the question of the issuance of the bonds and is estopped from contesting the validity thereof.

3rd. That the informalities complained of in respect to the calling of said election in regard to the bond issue, had been cured by an act adopted March 4, 1912, by the Legislature of the State of Mississippi.

4th. That the decree in the litigation between the parties as to the complainant's franchise was not *res adjudicata* on the right to build its own water works during the existence of the franchise in order to have the same ready for operation when such franchise would expire.

5th. That complainant was estopped from objecting to the construction by the city during the life of complainant's franchise, of its own water system to be operated after said franchise had expired, because the city had from time to time for several years past, as and when it caused cer-

tain of its streets to be paved, caused mains to be laid under said pavements with the express design of having such water mains form part of the water works plant which it proposed to build; that defendant in doing this work had expended large sums of money to the knowledge of the Vicksburg Water Works Company, and that it never undertook to prevent the laying of such mains, and that it was the duty of the complainant to have objected at the time and not to have permitted defendant to spend money for these purposes.

This answer contains this clause (R., p. 19):

“In this connection defendant repeats that complainant does not claim that the issuance of bonds and the building of a water works plant to be operated after the expiration of said franchise is a violation thereof, but only complains that it is a violation of said final decree which undertook to protect the rights growing out of and founded upon said franchise, and that by every principle of fair interpretation of complainant’s rights growing out of said franchise are not violated the decree founded thereon is not violated.”

On the coming in of this answer the complainant filed a supplemental and amended bill which is as diffuse and as argumentative as the defendant’s answer. The averments of the original bill are expanded with much detail. The only new matter contained in this amended and supplemental bill was:

1st. The bond election was attacked on the ground that the electors had been deceived and misled by the fraudulent and corrupt action of the defendants, and that practically all of the ballots cast in said election in favor of the issuance

of the bonds were illegal, either because the voters who cast them were not qualified and were not legal voters, or because they were induced to cast their ballots for the bond issue by the defendants' false and fraudulent publications and corrupt practices.

2nd: That the ratificatory and confirmatory act of the Mississippi Legislature, pleaded by the defendant as curing the irregularities set up in the bill, was for many reasons unconstitutional and void.

3rd: In avoidance of the extract above made from the defendant's answer, the terms and conditions of the franchise and contract granted by the defendant are set out in detail. It is there averred as to this franchise and contract, at page 51, as follows:

"That the necessary import and meaning of the provision of said contract above set out is that the said defendant obligated and bound itself for the period named, first, to allow the said Samuel R. Bullock & Co. the exclusive use and occupation of the streets and public places in the said defendant city for the construction, maintenance and operation of a system of water works; second, that it would not itself construct, maintain or operate a system of water works unless it should buy the system constructed by Bullock & Co. or their successors. The defendant is as much bound not to construct as it is not to maintain or operate. The city protected itself by reserving the right to purchase the Bullock & Co. plant at intervals of ten years. This protection was made perfect and complete by a further provision in said section nine as to how the price of the existing plant should be ascertained and fixed.

"That the said defendant having precluded itself from becoming the owner of a water works system during the life of said franchise contract,

any attempt upon its part to construct a system of water works or to otherwise become the owner of a water system, except by purchase of the Bullock system within said period, necessarily impairs the obligation of said contract and is therefore in violation of Sec. 10 of Art. 1 of the Constitution of the United States which provides as follows:

“No State shall * * * pass any * * * law impairing the obligations of contracts.”

The details of the litigation over this franchise and contract, and the decree entered thereon, are then set forth in great detail and averred to be *res adjudicata*. The bill then proceeds (page 57):

“Complainant further avers that even if the right of the city to construct a plant during the life of the Bullock franchise had not been raised and adjudicated in said suit above mentioned, that nevertheless the Court must now so hold, because the said Bullock franchise by clear and apt words grants to Bullock & Company the exclusive right during the said period of thirty years, first, of constructing a water works; second, of maintaining a water works, and third, of operating a water works. It follows necessarily that the defendant by granting to Bullock & Company the exclusive right precluded itself for the said period from exercising that right; that is, first, from constructing a water works; second, from maintaining a water works, and third, from operating a water works. The words, ‘constructing,’ ‘maintaining,’ and ‘operating,’ are joined or tied together by the conjunction ‘and,’ which denotes and unites co-ordinate elements. The privileges granted must therefore be considered as having equal rank or importance, and the obligation not to build be considered and held just as important and as binding on the city as the obligation not to operate.”

The prayer of this supplemental and amended bill is for a decree holding the bond election void and without effect, and the defendant without power to issue and float the bonds for the purpose of building a water plant during the life of the Bullock franchise, for an injunction restraining defendant from issuing bonds under said election, and from taking any further steps looking to the building of a water works plant during the life of the Bullock franchise, and for general relief (p. 74).

The answer admitted some of the allegations and denied the rest.

The case was put at issue in these pleadings by replication (p. 80).

The case being thus at issue, Leila Boykin, a citizen of Georgia, and a taxpayer in the City of Vicksburg, was permitted to intervene and join the complainant (R., pp. 89 to 93). She adopted all the allegations of the original and amended and supplemental bills of complainant, except so much and such parts of said bills as set up and plead a former adjudication in favor of the Vicksburg Water Works Company.

Defendants' answer to this intervention was that all of its denials and allegations in its answers to complainants' bill and supplemental bills "*insofar as he sues as a taxpayer of the City of Vicksburg,*" are applicable to her, and prays that all such denials and allegations may be taken and treated as specifically made in reference to petitioner.

The second supplemental bill was filed Dec. 27th, 1912. It set up that on that same day, the 27th of December, 1912, and since the filing of the original and supplemental bills, the defend-

ants, in violation of the final decree in the previous litigation, and in violation of the terms of the Bullock franchise on which said decree was based and with the evident purpose to commence the construction of a water plant of its own and without waiting for the trial of this cause upon its merits, did resolve and decide to lay water mains on certain streets of the city, and directed the mayor to advertise for bids for the laying of said mains; that accordingly the Mayor had advertised for such bids, the same to be received and opened on Jan. 6th, 1913; that unless restrained the defendants would on that day open and act on said bids and enter into a contract with the successful bidders to lay such mains before the present case can be heard, and thus inflict irreparable injury on the complainant.

The prayer was for a restraining order and a preliminary injunction prohibiting the defendant from carrying said resolution into effect, from receiving or accepting any of such bids, and from entering into any contract pursuant thereto, or undertaking in any manner to violate the decree of the Supreme Court of the United States affirming the decree of this court heretofore set up by taking any steps for the construction of a water plant of its own during the life of the Bullock franchise, and that on final hearing the said preliminary injunction be made perpetual.

The restraining order was issued and the case set for Jan. 10th on the hearing for the preliminary injunction.

Before that day came the defendants answered this second supplemental bill admitting that it was going to lay these mains with the purpose to commence the construction of a water system of

its own with the purpose not to use them until the expiration of the Bullock franchise, and affirming its right so to do and denying that in so doing it was violating the decree of the Supreme Court or the Bullock franchise.

A replication was immediately filed to this answer and the whole case was heard on all the pleadings and proofs on the 10th of January, 1913, the day fixed for the hearing on the application for preliminary injunction demanded in the second supplemental bill.

By consent of counsel the cause was taken under advisement to be decided in vacation as of the January term. (p. 152.)

On Feb. 4th a decree was entered and signed which is termed a final decree (p. 205). It adjudges:

1st. That the complainant is entitled to the relief prayed by him, that the motion for the preliminary injunction be sustained and that the defendants be enjoined from building or constructing within the city a system of water works, *or any part thereof*, until after the termination of the Bullock franchise.

2d. That defendants be enjoined from disposing of the issue of 400,000 of bonds with a view of constructing a water system, or any part thereof, in said city during the life of the Bullock franchise.

3d. That defendants pay all costs for which execution may issue.

The court gave written reasons for entering this decree (pp. 206 to 210), from which it appears that, although the case was before the

court on all the issues, it considered, and thought it necessary to consider the single issue as to whether the decision of the Supreme Court of the United States as reported in 202 U. S. p. 453 was conclusive of the defendant's right to construct its own water plant during the life of the franchise owned by complainant.

There was no disposition either in the opinion or the decree as to the other issues in the case, *i. e.* the validity of the bond election and the right of the city to issue the said bonds at all irrespective of the provisions of the Bullock franchise. Nor was the bill dismissed as to these issues raised by the complainant. Nor was the petition of intervention raising the same undisposed of issues dismissed.

The defendants appealed to the Circuit Court of Appeals from this decree on the very day it was entered (R., p. 211).

The assignment of errors (R., p. 212) were general only and complained

First, that there is no equity in complainant's bills and the court erred in entering a decree in their (*sic*) favor.

Second, that the court erred in entering the two specific provisions in the decree above set forth.

The Circuit Court of Appeals affirmed the decree of the District Court (p. 227), saying "a majority of the judges being of opinion that the decree of the Circuit Court in No. 41 of the docket, affirmed by the Supreme Court in *Vicksburg vs. Vicksburg Water Works*, 202 U. S. 453, constitutes an estoppel against the city of Vicksburg in the present suit, the decree appealed from should be and it is affirmed."

From this decree the defendants obtained an appeal to this court.

Motion is now made to dismiss this appeal on two grounds:

First. Because the decree entered in this cause in the District Court, from which an appeal was prosecuted to the Circuit Court of Appeals, and from whose decision affirming said decree this appeal is now sought to be prosecuted to this court, is not a final decree, disposing of the whole case, from which an appeal will lie.

Second. Because, if the said decree is a final decree from which an appeal will lie, then the decree on said appeal by the United States Circuit Court of Appeals is final in that court, and no appeal from said decree will lie to this court."

ARGUMENT.

I.

On the first ground of dismissal that the decree of the District Court was not final.

It is patent on the face of the issues as made by the pleadings that there are two separate and distinct causes of action set up, one prosecuted by the complainant and the intervenor complainant as taxpayers of the City of Vicksburg seeking to annul for all time and all purposes the whole issue of the 400,000 of bonds, irrespective of the purposes for which they were to be issued,

and one prosecuted by Henson, the receiver, as the owner of the Bullock franchise to prevent the City of Vicksburg from building its own water-works during the life of that franchise on the grounds, *first*, that the want of power so to build had already been in litigation between the parties and had been finally decreed against the city, and *second*, on the ground that if the right so to build had not been so finally denied, then it ought to be now denied because such action was in violation of the contract embodied in the franchise granted by the defendant and owned by the complainant, and that to issue and sell said bonds for this illegal purpose should be restrained during the life of the franchise.

The suit was really multifarious, and being filed before the new equity rules went into effect could have been objected to on that ground, but no such objection having been presented we take it that the parties must stand on the record as made.

We submit that the decree is not final,—

1st: Because it failed to adjudicate the validity of the bond election and the right to issue bonds thereunder, irrespective of the purpose for which they were to be issued.

2nd: Because it failed to dispose of the issue raised by the petition of Lelia Boykin the intervenor. She did not ask any relief on the ground that the right of the city to build water works during the life of the Bullock franchise had been adjudicated. On the other hand, she, by the express terms of her petition, excluded the complainant's averments in that regard, and did not pray any relief whatever predicated upon the

question of *res adjudicata* or upon the terms of the Bullock franchise. She sought relief solely on the ground that the bond election was invalid and void and did not empower the appellant city to issue the bonds in question. That question the court pointedly declined to adjudicate or even to dismiss her petition, or a similar demand contained in complainant's proceedings.

Under the statutes, Section 128 of the Judicial Code appeals may not be prosecuted to the Circuit Court of Appeals except from final decrees. The rule as to what is a final decree has been many times laid down by this court. We quote first from the opinion in

Craighead et al. v. Wilson, 18 Howard, 199; 15 L. Ed. 332:

"To authorize an appeal, the decree must be final in all matters within the pleadings, so that an affirmance of the decree will end the suit."

In *Green v. Fisk et al.*, 13 Otto 518, 26 L.Ed. 485, the Court said:

"A Decree cannot be said to be final until the court has completed its adjudication of the cause."

In *Bostwick v. Brinkerhoff*, 16 Otto 3, 27 L.Ed. 73 this Court again said:

"The rule is well settled and of long standing, that a judgment or decree, to be final, within the meaning of that term as used in the acts of Congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but

to execute the judgment or decree it had already rendered."

The same rule is stated in

Grant v. Phoenix Fire Ins. Co. et al, 16 Otto 429, 27 L.Ed. 237.

St. Louis etc. & R. Co. v. Southern Express Co., 108 U. S. 24; 27 L.Ed. 638.

Dainese v. Kendall, 119 U. S. 53, 30 L.Ed. 305.

Rexford vs. Brunswick-Balke-Collender Co., 228 U. S. 339.

City of Paducah vs. East Tenn. Telephone Co., 228 U. S. —.

In *Keystone etc. Co., v. Martin*, 132 U. S. 91, 33 L.Ed. 275, this Court said:

"We think that the decree is not a final decree, and that this court has no jurisdiction of the appeal. The decree is not final, because it does not dispose of the entire controversy between the parties. The bill prays only for an injunction and an account of the quantity and value of the ore taken from the land by defendant. The injunction is granted, but the account remains to be taken. The case is not one where nothing remains to be done by the court below except to execute ministerially its decree. In all cases like the one before us this court has uniformly held that the decree was not final and was not appealable."

It will be observed that this case is almost identical with the one at bar. The injunction was granted and made final just as in the case at bar, but the amount due for ore already taken from the mine was left open just as the case at bar

leaves open the question of the validity of the bond election.

In *McGourkey v. Toledo & Ohio Central Railway Company*, 146 U. S. 536, 36 L.Ed., 1079, this Court after reviewing a number of cases involving decrees held to be final said:

“There are none of these cases which go to the extent of holding a decree of this kind final. While it directed the surrender of the rolling stock in question to petitioner, it did not purport to pass upon his title to the same, and referred the case to a master, in accordance with the prayer of the bill, to take an account not only of rents and profits and of damage to the rolling stock, but of ‘all questions and matters of difference’ between the receiver and the petitioner ‘growing out of the use and restoration of the same.’ This decree could not be said to be a complete decision of the matter in controversy, or to leave ministerial duties only to be performed, or to direct an accounting merely as an incident to the relief prayed for in the bill.”

In *Covington v. First National Bank of Covington*, 185 U. S. 270; 46 L.Ed. 906 this court again said:

“While the decree on its face thus unambiguously discloses that the court did not finally dispose of the entire controversy made by the pleadings, an inspection of the opinion of the court makes it perfectly clear that the court did not intend to and did not dispose of the entire controversy which was involved in the cause.

“As a necessary result this court cannot adjudicate upon the contention respecting that portion of the issue which was actually determined by the circuit court, because a decree of a circuit

court upon the merits can be reviewed here only by appeal, which cannot be taken until after a final decree has been made disposing of the whole cause. The case is not to be brought here in fragments by successive appeals."

The case at bar is very much like the above. There was clearly an attempt to adjudicate finally the question of *res adjudicata* and to give such relief as could be predicated upon that averment, but it is equally clear that the question of the validity of the bond election was not adjudicated and that such relief as was predicated thereon by the pleadings and prayed for therein was neither given nor denied. If the case should be affirmed by this court could it be said that the whole controversy had been terminated and that nothing remained except to enforce the decree of the court below. Certainly the validity of the bond election would be left undetermined. Should the city undertake to float the bonds in question for the purpose of building a water works after the termination of the Bullock franchise it would not thereby violate the terms of the decree or lay itself liable to punishment under the injunction. Yet the appellees would each have to bear the burden of taxation to pay the interest and principal of said bonds regardless of whether said bond election was properly conducted and legally held and carried or not. On the other hand the decree does not give the city the right to issue and sell the said bonds. It merely leaves the question open and undetermined where it was before the decree was rendered. Under this state of facts it seems to us that it cannot be said that nothing remains except to enforce the decree rendered by the district court. Certainly both the

complainant and the intervenor are entitled to have an adjudication as to the validity of the bond election and the right of appellant to issue thereunder the bonds in question. The intervenor has property in the City of Vicksburg liable to taxation and so has complainant. When the franchise shall have terminated in November, 1916, these same properties will still be subject to taxation. While the personal property of the complainant, comprising the water works property proper, may cease to have value and thereby cease to be a proper subject of taxation this cannot be true of his real estate which appears from the bill of complaint and the evidence to be of great value. Certainly he has the right to insist that these properties shall not be taxed unlawfully to pay the principal and interest of bonds which the appellant had no right to issue, and certainly the intervenor has a like and equal right.

In the case of *Thomas v. Wollridge et al*, 23 Wall. 283, 23 L. Ed. 135, the court said:

"In this case the bill was not dismissed. It may have been the intention of the court to dispose of the whole case by the entry as made, but that intention is certainly not expressed. A motion was made to dissolve the injunction upon the bill and answer filed. It does not appear that the case was heard except upon this motion, and there is nothing in the record to show that it will not be still within the power of the circuit court upon the dismissal of the appeal to grant the complainants all the relief they ask. The case is still open on its merits. It is only the interlocutory order that has been disposed of."

The case at bar follows the above case closely. While it was clearly the intention of the district

court to give full relief upon the one issue, and he may have considered that that would have determined the case, yet, as a matter of fact the relief he gave was nothing more than what he could and should have given on the motion for an injunction. His decree did not dismiss the intervenor's petition nor did it dismiss that part of the receiver's bill wherein he set up and pleaded the invalidity of the bond election nor did it give or deny any relief upon such averments. Like the case above quoted it left these pleadings standing with the issues raised by them wholly undetermined.

We especially direct the attention of the court to the fact that none of the relief prayed for by Lelia Boykin has been granted. She is a party to the suit and as much entitled to relief as the original complainant, yet nothing has been decreed in her favor or against her. Because of this fact she has filed a petition in the United States Circuit Court of Appeals praying for a writ of mandamus against the Hon. H. C. Niles, the District Judge who rendered the decree appealed from praying that he be required to decide the issue raised by the pleadings as to the validity of the bond election.

It cannot be said that the receiver got part relief because the relief given him was complete as far as it went. It covered perfectly the averments of his bill in reference to the former adjudication, and was not different or less complete than the relief which he prayed for under his franchise averments, but it was entirely different from the relief which he as a taxpayer prayed for on his averment as to the illegality of the bond election. The relief prayed for under his averment as to the

bond election had no reference whatever to the termination of his franchise. He would be as much entitled to that without a franchise as with it. It had reference solely to his rights as a tax payer and not as a franchise owner. If the bond election was invalid he was entitled to have it set aside. The relief prayed for under this head pertained to his tangible property, and would subsist and continue after his franchise had terminated the same as before. In reference to his rights as a tax payer he, like the intervenor, received no relief whatever. He could not appeal from the refusal of the court to decree upon this subject because nothing was decided against him. A cross appeal like a direct appeal must be levelled at that which has been decided against the cross appellant. He cannot predicate a cross appeal upon what the court has failed or refused to decide because he could not assign error of a mere negation.

In *London v. Taxing District etc.*, 14 Otto 771, 26 L. Ed. 993, this court said:

“An appeal brings up for review only that which was decided adversely to appellant.”

We have reviewed practically all of the decisions by this court in which an appellee has sought relief beyond what was decreed to him by the court below, and in which such relief was denied him here because he had not taken a cross appeal, and find that the court below fully adjudicated every issue raised by the pleading in all the cases.

None of them involve the refusal of the court below to decide an issue or raise any question as to the finality of the decree below.

As illustrative of this point we cite the following cases:

- New Orleans *v.* Bayousara Mail Co. *v.* Fernandez, 79 U. S. 1, 20 L. Ed. 249.
 Martin *et. al.* *v.* Northern Transportation Co., 79 U. S. 4, 20 L. Ed. 251.
 Mt. Pleasant *et. al.* *v.* Chas. Beckwith, 100 U. S. 514, 25 L. Ed. 699.
 London *v.* Taxing District, 104 U. S. 771, 26 L. Ed. 923.
 Greaves *v.* Sentell, 153 U. S. 465, 38 L. Ed. 38.
 United States *v.* Blackfeather, 155 U. S. 180; 39 L. Ed. 114.
 United States *v.* Johnston Blackfeather, 155 U. S. 218, 39 L. Ed. 126.
 Bolles *v.* Outing Co., 175 U. S. 262; 44 L. Ed. 156.

We submit that in a case of this kind, it was the duty of the defendant to demand a decision by the court on the whole case in order that the decree might be final and he might take an appeal; and that if the court declined to decide the whole case to compel such decisions by a writ of mandamus. Similarly we contend that the complainant could get no relief from such a decree by a cross appeal and that he also must compel the court to decide the whole case in order to be heard in the appellate court on the ignored and undecided causes of action.

In *Ex Parte* Jno. H. Russell, 13 Wall, 664, 20 L. Ed. 632, this Court said:

“Where a court declines to hear a case or motion, alleging its own incompetency to do so, or

that of the party to be heard, mandamus is the proper remedy. A writ of error or appeal does not lie; for what has the appellate court to review where the inferior court has not decided the case, but has refused to hear it."

In *Crawford v. Haller*, 111 U. S. 796, L. Ed. 602, this Court again said:

"The dismissal of the writ was a refusal to hear and decide the cause. The remedy in such a case, if any, is by mandamus to compel the court to entertain the case and proceed to its determination, not by writ of error to review what has been done."

This case came up on motion to dismiss the same as the case at bar. The territorial Supreme Court of Washington Territory had dismissed a writ of error to it under the impression that it had no jurisdiction because the same had not been prosecuted in time. The question before the Supreme Court was whether or not the order of the Territorial Supreme Court dismissing the writ of error and refusing to take jurisdiction was a final order from which an appeal could be prosecuted to the U. S. Supreme Court. The Court held that it was not.

In *re Parker*, 131 U. S., 221, 33 L. Ed. 123, this Court said:

"The right of mandamus lies as held in *Ex parte Parker*, 126 U. S. 737, where an inferior court refused to take jurisdiction when by law it ought to do so, or where having obtained jurisdiction it refuses to proceed in its exercise."

Under the foregoing authorities we have considered a cross appeal not the proper remedy for

either of appellees. While the receiver did not join with Lelia Boykin in the petition for a writ of mandamus he has the right to do so yet; but he has considered it prudent to await the action of this court as to the finality of the decree before taking that course.

II.

On the second ground of dismissal that no appeal lies to this court from the decree of the Circuit Court in this case.

Should the court agree with us that the decree of the district court is not final within the meaning of the statute authorizing an appeal therefrom, there will be no need to consider this second ground of dismissal.

The test of the right to appeal to this court from the Circuit Court of Appeals is whether or not the jurisdiction of the District Court was invoked solely upon any other ground than that of diverse citizenship. Strike this averment from complainant's original bill and if there be left in the bill another ground of its jurisdiction an appeal lies to this court but not otherwise:

If a ground of federal jurisdiction, other than diverse citizenship, be raised in the case at any time after the filing of the original bill it cannot be considered for jurisdictional purposes for the reason that jurisdiction of the District Court was not invoked upon such ground and such case is not included by the terms of the statute:

In support of this contention we cite:

Colorado Central, etc., R. Co. *v.* Turek, 150
U. S. 138; 37 L. Ed. 1030.

"This complaint was filed December 2, 1885, and alleged the diverse citizenship of the parties as the ground of jurisdiction. But it is said that the vital question raised in the case was whether the patentee of a lode claim, whose discovery and patent were later than the date of another's patent, may follow his junior patented lode, the apex thereof being within his side lines, into the other's patented ground on the dip; and that the solution of this question depended upon the construction and application of Section 2322 of the Revised Statutes, concerning the dip and apex of lodes. Hence that the suit really and substantially involved a controversy only to be determined by reference to the federal statute, and that jurisdiction existed on that ground and did not depend entirely upon the other.

To maintain this proposition, it is contended that reference may be made to the entire pleadings, the evidence, or the rulings of the courts below.

This view, however, ignores the settled doctrine that the inquiry, in cases such as this, into the jurisdiction of the circuit court, is limited to the facts appearing on the record in the first instance. This court has often so held in the enforcement of the inflexible rule which requires this court in the exercise of its appellate power to deny the jurisdiction of courts on the United States in all cases where such jurisdiction does not affirmatively appear in the record on which it is called to act."

In *Borgmeyer v. Idler et al.*, 159 U. S. 408, 40 L. Ed. 199, Chief Justice Fuller, speaking for the court said:

"The jurisdiction of the circuit court depended entirely upon diverse citizenship when the suit was commenced, and to that point of time the inquiry must necessarily be referred. Had the case been brought to this court from the circuit court, the writ of error could not have been entertained."

In *Press Publishing Co. v. Harriett Monroe*, 164 U. S. 105, 41 L. Ed. 367, Justice Gray, speaking for the Court, said:

"The jurisdiction of the circuit court having been obtained and exercised solely because of the parties being citizens of different states, the judgment of the circuit court of appeals was final, and the writ of error must be dismissed for want of jurisdiction."

To the same effect are the following other cases:

Ex parte Chas. F. Jones, 164 U. S. 691, 41 L. Ed. 601.

Louis Loeb v. Trustees Columbia Township, 179 U. S. 472; 45 L. Ed. 280;

Huguley Mfg. Co. v. Galeson Cotton Mills, 184 U. S. 290; 46 L. Ed. 546.

Speckles Sugar Ref. Co. v. McLain, 192 U. S. 397, 48 L. Ed. 496.

Bagley v. General Fire Extinguisher Co., 212 U. S. 447; 53 L. Ed. 605.

Wein et al. v. Rountree, 216 U. S. 607; 54 L. Ed. 635.

St. Louis, K. C. & C. R. Co. v. Wabash R. Co. et al., 217 U. S. 247, 54 L. Ed. 752.

Third Street and S. R. Co. v. Lewis, 173 U. S. 457, 43 L. Ed. 766.

In the case at bar as shown by the statement of facts the original bill filed by the complainant averred (first) diverse citizenship; (second) a former adjudication of one of the issues, and, (third), the invalidity of the bond election.

We think that none of these raised a jurisdictional question except the first.

The right of appeal from the circuit court of appeals to this court is given by Section 241 of the Judicial Code and is as follows:

“In any case in which the judgment or decree of the circuit court of appeals is not made final by the provisions of this Title, there shall be of right an appeal or writ of error to the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars, besides cost.”

Section 128 of the Judicial Code provides:

“That the judgments and decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different states; and also in all cases arising under the patent laws, under the copyright laws, under the revenue laws, and under the criminal laws, and in admiralty cases.”

The case at bar, not being a case arising under the patent laws, copyright laws, revenue laws, or criminal laws, nor a case in admiralty, there is left open only the question as to whether or not the jurisdiction of the district court was based solely on diversity of citizenship. Certainly there is no other jurisdictional question unless the

pleading of a former decree of a federal court and the prayer for relief based thereon can be considered as involving a construction of the laws of the United States, thereby raising an additional jurisdictional question, or unless the fact that the Complainant was appointed receiver by a federal court can be considered as raising such question. The adjudications of this court exclude both, as we shall now show.

In the case of *Provident Sav. L. Assur. Society v. Ford*, 114 U. S. 635; 29 L. Ed. 261, this court said:

“It is suggested, however, that a suit on a judgment recovered in a United States court is necessarily a suit arising under the laws of the United States, as much so as if the plaintiff or defendant were a corporation of the United States; and hence that such a suit is removable.

“What is a judgment but a security of record showing a debt due from one person to another? It is as much a mere security as a treasury note, or a bond of the United States. If A brings an action against B, trover or otherwise, for the withholding of such securities it is not therefore a case arising under the laws of the United States, although the whole value of the securities depends upon the fact of their being the obligations of the United States. So if A have title to land by patent of the United States and brings an action against B for trespass or waste, committed by cutting timber, or by mining and carrying away precious ores, or the like, it is not therefore a case arising under the laws of the United States. It is simply a case of ordinary right of property sought to be enforced. A suit on a judgment is nothing more, unless some question is raised in the case (as might be raised in any of the cases specified), distinctly involving the laws of the

United States—such a question, for example, as was ineffectually attempted to be raised by the defendant in this case. If such a question were raised, then it is conceded it would be a case arising under the laws of the United States.

These considerations show a wide distinction, as it seems to us, between the case of a suit merely on a judgment of the United States corporation; which latter, according to the masterly analysis of Chief Justice Marshall in *Osborne v. Bank*, 9 Wheat, 738, is pervaded from its origin to its close by the United States law and United States authority."

The original bill in the case at bar makes no mention of the Constitution of the United States or of any law of the United States, nor does it aver any facts dependent on or affected by either in Constitution or laws:

In *Leather Manufacturers' National Bank v. Cooper*, 120 U. S. 778; 30 L. Ed. 816, the Court said:

"A suggestion was made in the argument that the case is one arising under the laws of the United States, for the reason that the cause of action is identical with that sued on in *Leather Manufacturers' National Bank v. Morgan*, 117 U. S. 96; 29 L. Ed. 811, decided by this court at the last term, and in which the principles of law which govern the rights of the parties were determined. Nothing of the kind, however, appears in the record, and if it did it would not authorize a removal. This is not that suit, and a case does not arise under the laws of the United States, simply because this court, or any other federal court, has decided in another suit the questions of law which are involved."

The case at bar is peculiarly like the above in that complainant prays relief under a former ad-

judication because it involved the identical principles of law which he desired to invoke.

In *Metcalf v. City of Watertown*, 128 U. S. 586, 32 L. Ed. 543, the Court said:

"Nor can the jurisdiction of the circuit court be maintained upon the theory that the suit is one arising under the Constitution or laws of the United States. The fact that it was brought to recover the amount of a judgment of a court of the United States, does not, of itself make it a suit of that character; for the plaintiff, without raising by his complaint any distinct question of a federal nature, and without indication, by proper averment, how the termination of any question of that character is involved in the case seeks to enforce an ordinary right of property, by suing upon the judgment merely as a security of record, showing a debt due from the City of Watertown. *Provident Sav. L. Assur. Soc. v. Ford*, 114 U. S. 635, 641 (29 L. Ed. 261). The plaintiff, it is true, contends that the limitation of ten years could not, consistently with the Constitution of the United States, be applied to an action upon a judgment or a decree of a court of the United States, when a longer period was given within which to sue upon a judgment or decree of a court of record established by the laws of Wisconsin. And if the plaintiff properly invoked the original jurisdiction of the Circuit Court of the United States, in respect to the question of limitation, under one construction of the local statute, would be decisive in the case. But is the present suit, therefore, one arising under the Constitution or laws of the United States, within the meaning of the Act of 1875? We think not."

Can the fact that the complainant was appointed receiver by a federal court be treated as an additional ground of jurisdiction?

Upon this point we quote the case of

Gableman v. Peoria D. & R. Co., 179 U. S. 335, 45 L. Ed. 220. In this case the court said:

"The receiver rested his contention that the case arose under the Constitution and laws of the United States on the single ground of his appointment by the Federal Court; and, upon this record, our opinion of the tenability of that ground is requested."

* * *

"The question is whether the bare fact that the appointment of this receiver was by a Federal Court make all actions against him cases arising under the Constitution or laws of the United States, notwithstanding he was appointed under the general equity powers of courts of chancery, and not under any provision of that Constitution or of those laws; and that his liability depends on general law, and his defense does not rest on any act of Congress. We are of the opinion that this question must be answered in the negative, and that this has been heretofore determined as the circuit court of appeals properly held in this case."

Under these cases we submit that neither the pleading of a decree of a federal court in another suit or the fact of the complainant's having been appointed receiver by a Federal Court can be invoked as an additional ground of jurisdiction in the absence of a further averment that one or both depended on or was affected by the Constitution or some law of the United States. The record in this case discloses no such averment. It must be, therefore, that the jurisdiction of the district court was invoked solely on the ground of diverse citizenship and being so the decision of the Circuit Court of Appeals is final under the

statute and there is no right to a review before this court. We consider after a careful reading of the amended and supplemental bill of complaint, that it is equally barren of any additional ground of jurisdiction but if the court should disagree with us as to that and consider that such additional ground is set out, it could not avail appellant because amended and supplemental pleadings can not, under the foregoing decision, be considered. Nothing but the original or first pleading filed by the plaintiff or complainant can be considered for jurisdictional purposes because that alone invokes the jurisdiction of the court.

We cite in support of this contention the case of *Third St. & S. R. Co. v. Lewis*, 173 U. S. 457; 43 L. Ed. 766 and *St. Louis K. C. C. R. Co. vs. Wabash R. Co. et al.* 217 U. S. 247; 54 L. Ed. 752.

The most that can be said in favor of the right of appeal is that in the first supplemental and amended bill filed after answer was filed, there are averments which may be construed as a setting up by the complainant of the constitution of the United States as a shield to protect his franchise and contract from infringement by the defendants. Even if we concede that these averments can be so construed, they do nothing more than introduce a federal question into a case of which the court was asked to take jurisdiction only on the ground of diverse citizenship. In such a case with such a question so introduced, an appeal may lie directly to the Supreme Court of the United States, but if the party chooses to take his appeal to the Circuit Court of Appeals, then he cannot of right appeal from that court to this court. This Court cannot review such a case except by certiorari.

These propositions are fully supported in the cases above cited.

We submit that the appeal must be dismissed.

Respectfully,

J. C. BRYSON,

JOSEPH HIRSH,

EDGAR H. FARRAR,

counsel for Appellees.

6
No. 546.

Mississippi Supreme Court

FILED

OCT 8 19

JAMES H. McKE

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

MAYOR AND ALDERMEN OF THE CITY OF VICKSBURG,

Appellant.

vs.

W. A. HENSON, RECEIVER OF THE VICKSBURG WATER

WORKS COMPANY, ET AL.

Appellees.

**BRIEF FOR APPELLANT IN OPPOSITION TO
MOTION TO DISMISS APPEAL.**

**T. C. CATCHINGS,
O. W. CATCHINGS,
GEORGE ANDERSON,
JOHN BRUNINI,
*Solicitors for Appellant.***

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

MAYOR AND ALDERMEN OF THE CITY OF VICKSBURG,
Appellant.

VS.

W. A. HENSON, RECEIVER OF THE VICKSBURG WATER
WORKS COMPANY, ET AL.
Appellees.

SUBJECT INDEX.

	PAGE
The decree of the District Court was final, but even if it is now too late for appellees to raise this question.....	2
The decree of the Circuit Court of Appeals is not final in the sense that no appeal lies therefrom to this court.....	16

CASES REFERRED TO.

	PAGE
Craighead vs. Wilson, 18 How, 199.....	4
Green vs. Fisk, et al, 13 Otto, 518.....	4
Bostwick vs. Brinkerhoff, 16 Otto, 3.....	4
Grant vs. Phoenix Fire Insurance Co., 16 Otto, 429.....	4
St. Louis, etc., R. R. Co. vs. Southern Express Co., 108 U. S., 24.....	4
Dainese vs. Kendall, 119 U. S., 553.....	5
Rexford vs. Brunswick-Balke Collender Co., 228 U. S., 339.....	5
City of Paducah vs. E. Tenn. Telephone Co., 228 U. S. —.....	5
Keystone, etc., Co. vs. Martin, 132 U. S., 91.....	5
McGourkey vs. Toledo, etc., R. R. Co., 146 U. S. 536.....	5

	PAGE
Covington vs. First National Bank of Covington, 185 U. S., 270	6
Mayor and Aldermen of the City of Vicksburg vs. Vicksburg Water- works Co., 202 U. S., 458.....	7
Ex p. DeGroot, 6 Wall. (U. S.) 497.....	9
Ex p. Whitney, 13 Pet. (U. S.) 404.....	9
Ex p. Bradstreet, 7 Pet. (U. S.) 634.....	9
Ex p. Hoyt, 13 Pet. (U. S.) 279.....	9
In re Bardett, 127 (U. S.) 771.....	9
Patent Com'rs vs. Whiteley, 4 Wall. (U. S.) 522.....	9
Ex p. Russell, 13 Wall. (U. S.) 664.....	9
Ex p. Newman, 14 Wall. (U. S.) 152.....	9
Ex p. Taylor, 14 How. (U. S.) 3.....	9
Ex p. Flippen, 94 (U. S.) 348.....	9
Ex p. Schwab, 98 (U. S.) 240.....	9
Ex p. Denver, etc., R. R. Co., 101 (U. S.) 711.....	10
Ex p. Perry, 102 (U. S.) 183.....	10
Ex p. Des Moines, etc., R. R. Co., 103 (U. S.) 794.....	10
Ex p. Burtis, 103 (U. S.) 238.....	10
Ex p. Baltimore, etc., R. R. Co. 108 (U. S.) 566.....	10
Ex p. Morgan 114 (U. S.) 174.....	10
Ex p. Brown, 116 (U. S.) 401.....	10
Ex p. Parker, 120 (U. S.) 737.....	10
In re Burdett, 127 (U. S.) 771.....	10
Parker Petitioner, 131 (U. S.) 221.....	10
In re Hawkins, 147 (U. S.) 486.....	10
In re Morrison, 147 (U. S.) 14	10
American Constr. Co. vs. Jacksonville R. R. Co., 148 (U. S.) 372.....	10
In re Humes, 149 (U. S.) 192.....	10
In re Parsons, 150 (U. S.) 150.....	10
In re Rice, 155 (U. S.) 396.....	10
In re Atlantic City R. R. Co., 164 (U. S.) 633.....	10
Ex parte Russell, 13 Wall., 664	11
Crawford vs. Haller, 111 U. S., 796	11
In re Parker, 131 U. S., 221.....	11
Baltimore & Ohio R. R. Co. vs. McLaughlin, 73 Fed., 519.....	22
Bowden vs. Burnham, 59 Fed., 752.....	23
Howard vs. De Cordova, 177 U. S., 609.....	24
Third St. & S. R. R. Co. vs. Lewis, 173 U. S., 457.....	24
St. Louis R. R. Co. vs. Wabash R. R. Co., 217 U. S., 247.....	24
Shulthis vs. McDougal, 225 U. S., 561.....	25

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

MAYOR AND ALDERMEN OF THE CITY OF VICKSBURG,

Appellant,

vs.

W. A. HENSON, RECEIVER OF THE VICKSBURG WATER
WORKS COMPANY, ET AL.

Appellees.

BRIEF FOR APPELLANT IN OPPOSITION TO MOTION TO DISMISS APPEAL.

Inasmuch as the motion to dismiss the appeal cannot be disposed of without an examination of the pleadings, and, indeed, of the entire record except that portion which relates to the evidence, we presume that its consideration will be deferred until the hearing of the case on the merits in order that the court may be saved a possible double investigation of the entire controversy. We will not, therefore, undertake a statement of facts, but will refer to that contained in our brief on the merits, which has already been filed and which we believe is full, fair and accurate.

It is contended that the appeal should be dismissed, first, because the decree of the District Court was not final, and, second, because the decree of the Circuit Court of Appeals was final in the sense that no appeal lies therefrom to this court,

FIRST.

THE DECREE OF THE DISTRICT COURT WAS FINAL, BUT EVEN IF IT WERE NOT, IT IS NOW TOO LATE FOR APPELLEES TO RAISE THIS QUESTION.

It is contended that the decree of the District Court was not final, for the reason that two issues were presented by the pleadings and only one was disposed of. We deny that two issues were in fact raised, and submit that even if this be the case the finality of the decree was in no way affected by the court's failure to decide every contention advanced.

It appears by the pleadings, and, indeed, by the statement of facts contained in the brief for appellees on the motion to dismiss, that the suit was brought for the sole purpose of enjoining the corporate authorities of Vicksburg from immediately issuing bonds to erect a waterworks system to be operated, however, only after the expiration of the franchise. This purpose was alleged in the original and supplemental bills of complaint, and admitted in both answers. There was no suggestion that the city entertained any other purpose than this. It was not alleged, and could not have been that there was in contemplation a plan to await the expiration of the franchise and then erect waterworks. The constantly expressed qualification that the waterworks system to be erected should not be operated until after the expiration of the franchise showed conclusively the purpose to be to build at once and hold the plant in readiness to begin operations after the franchise should have expired.

The proceeding was one for an injunction, and upon familiar principles the complainant was entitled only to be protected from a threatened and imminent invasion of his rights. He had no right to procure an injunction by reason of any vague apprehension he might entertain that in the future his rights might be infringed upon. A concrete case must have been presented. As we have said, the only action contemplated

by the city and the only claim of injury set up by the complainant, was the immediate issuance of bonds and the erection of a waterworks system to be operated after the expiration of the franchise. Complainant, therefore, was entitled to no other relief, if he successfully maintained his position, than an injunction prohibiting the city from effectuating its contemplated purpose. The District Court sustained the contention of complainant, and enjoined the city from erecting waterworks at all during the existence of the franchise and from issuing bonds for that purpose. It was thus enjoined from doing the only thing it contemplated doing. It is true that its right to carry out its plan was attacked by complainant on two grounds. First, that the franchise in itself, and the decree of this court in Cause No. 41 Equity, prohibited the city from erecting a waterworks system during the life of the franchise, and, second, that the bonds were not properly authorized.

It thus appears that while a single invasion of complainant's rights was alleged, it was contended that the contemplated action of the city was illegal for two reasons. The District Court enjoined, as we have said, the alleged wrong, but chose to base its decree upon only one of the two grounds raised by complainant. Counsel, we respectfully submit, confuse the issues raised by the pleadings with the points of law relied upon by them in support of their contention. There was but one issue, and that was determined. There were two points made in support of the issue tendered by complainant, but only one of them was decided, the court adjudging that there was but one real question presented; that is to say, the city's right to erect a waterworks system during the life of the franchise.

However this may be, we submit that even if there were in fact two issues sought to be raised by complainant's pleadings, the decree of the District Court is none the less final in that it did not decide both of these issues. The test of finality of a decree is not whether it so disposes of every issue or con-

tention presented as to render future litigation over the subject matter impossible, but whether or not it finally disposes of the case in which it is rendered, so that no further proceedings may be had therein. Counsel say that complainant had the right to have determined the abstract question as to whether or not the bonds might be issued after the expiration of the franchise, because of the alleged irregularity in the proceedings looking to their issuance, and they say that the city's rights in this particular may be the subject of future litigation, and that, therefore, the decree is not final. This is to us a novel contention. We have never heard it suggested before that a court must of necessity dispose of every issue directly or indirectly presented, and that until this shall have been done no appeal can be prosecuted from its decree.

We have carefully examined every case cited by counsel in support of this extraordinary announcement, and not one tends even in the remotest decree to sustain it. At the risk of being tiresome, we will briefly examine each case cited on this point, and will show that in all of them the decree appealed from reserved the cause for future consideration, and did not even purport to be a final disposition of the controversy.

In *Craighead vs. Wilson*, 18 How. 199, the decree expressly referred the case to a master to report back to the court, which then, of course, must needs proceed further.

In *Green vs. Fisk, et al.*, 13 Otto, 518, there was likewise a reference to a master.

In *Bostwick vs. Brinkerhoff*, 16 Otto, 3, the decree appealed from was that of an appellate tribunal, which reversed and remanded the cause to a lower court for further proceedings.

In *Grant vs. Phoenix Fire Insurance Co.*, 16 Otto, 429, there was also a reference to a master.

In *St. Louis, etc., R. R. Co. vs. Southern Express Co.*, 108 U. S., 24, the decree was in fact held final and the court announced the elementary principle that "a decree is final for the

purposes of appeal when it terminates the litigation between the parties on the merits and leaves nothing to be done but enforce by execution what has been determined."

In *Dainese vs. Kendall*, 119 U. S., 553, the decree appealed from was one reversing and remanding an order for further proceedings by a lower court.

In the recent cases of *Rexford vs. Brunswick-Balke-Collender Co.*, 228 U. S., 339, and *City of Paducah vs. E. Tenn., Telephone Co.*, 228 U. S. —, the causes were expressly reserved for further action by the court.

In *Keystone, etc., Co., vs. Martin*, 132 U. S. 91, which counsel say "is almost identical with the one at bar," the decree appealed from referred the case to a master for an accounting, and it was upon this ground alone that this court held it not to be final. It was expressly pointed out that the injunction was granted, but the account remained to be taken, and that the case, therefore, was not one where nothing remained to be done by the court below except to execute ministerially its decree.

It would be hard to imagine a case more different from the one at bar, and so far from supporting counsel's contention, it is squarely in point to the contrary. It expressly holds that where nothing remains to be done by the *court below* except to execute its decree ministerially, it is final and may be appealed from. This is, of course, the true test. It is not necessary that the entire controversy shall be so disposed of that no further issue can arise in future to be determined by any other court, or in any other proceeding. It is only required that the court in a pending cause shall have, so far as it is concerned, in that litigation, ended the controversy and divested itself of all future control over it. When this has been done nothing remains but ministerially to execute the decree. We submit that this is true in the case at bar.

In *McGourkey vs. Toledo, etc., R. R. Co.*, 146 U. S., 536, there was likewise a reference to a master, and in *Covington vs.*

First National Bank of Covington, 185, U. S., 270, which counsel say "is very much like the case at bar," the cause was expressly retained for further proceedings.

These are all of the cases cited by counsel for appellees, and it is apparent that, as we have already said, they have no conceivable relation to the present situation. There can be no doubt that the decree of the District Court finally decided the controversy insofar as it was concerned, and that after its rendition nothing whatsoever remained for it to do except to execute the decree, as it had lost entire control of the controversy and divested itself of any jurisdiction to enter a further order. If the decree had enjoined the city from building waterworks or issuing bonds for that purpose during the life of the franchise and had expressly reserved for future determination its right after its expiration to issue bonds to build waterworks, the cases cited by counsel would be in point. There would not then have been a final disposition of the case, and the rule prohibiting appeals from decrees other than those of a final nature, would have applied. This rule is founded upon the desirability of preventing successive appeals in the same case. It is considered proper that the entire controversy shall have been disposed of before the appellate court is called upon to deal with it. If such a decree as we have indicated had been rendered an appeal could not have been taken from it now, because at some future time an order might be made as to the question reserved for decision, which would lead to another appeal. As the matter stands, however, there can be no further order entered in the controversy, and, therefore, no other appeal taken. So far as the District Court is concerned, the matter is closed, and the decree, whether or not it rightfully or wrongfully failed to dispose of every contention presented, is none the less a final decree and subject to appeal. Certainly, if the decree is not a final one it is an interlocutory one, and it cannot be this unless the court has power by subsequent proceedings to render a final decree.

It is not conceivable that a case can become so entangled in technicalities that a decree which purports finally to dispose of it can be said to be only interlocutory, and yet the court has no power to follow it up with a final decree. In the case at bar the cause was set down for final hearing, was argued, submitted to and considered by the court, and what purported to be a final decree was rendered. Nothing was reserved for future action or consideration, but the court in its opinion expressly stated that it had decided what seemed to it, in the exercise of its judicial discretion, to be the only real question presented. Can it now change its ruling and conclude that there were other issues presented which should be decided, and, after the expiration of the term at which the decree was entered, render a new decree undertaking to adjudicate these matters?

Counsel suggest, although we hardly think it is intended seriously, that when the court delivered its opinion, which will be found on page 206 of the transcript, in which it said that "believing as we do that the real question here presented has been decided in express terms by this court and affirmed by the Supreme Court of the United States in 202 U. S., 458-472, and is *res adjudicata*, it is not necessary to consider any other question presented by learned counsel"; and when they themselves, acting as the counsel for the receiver and his co-complainant, Miss Boykin, prepared the decree appealed from, it was the duty of counsel for appellee to procure a writ of mandamus directed to the District Court, compelling it to decide the questions which it held were not necessarily involved, and to correct the decree drawn by them.

This would not only place a most extraordinary duty upon the losing party, but would involve a novel use of the writ of mandamus. It is elementary law which has been many times announced by this court, that a trial judge cannot be required by mandamus to do anything other than perform a ministerial act; that he cannot be compelled to reverse a decision rendered by him; nor to decide a question in a given way, and

that its only function is to direct him to consider judicially a controversy which is properly presented. When he has done this he has done all that is required of him, and if in the exercise of his discretion he directly or indirectly decides the controversy erroneously, either by reason of a failure to grant the relief prayed for, or to properly apprehend all of the questions presented, the remedy is by appeal.

In the case at bar the District Judge proceeded to a final hearing of the entire case, determined what to him seemed to be the only real question involved, and rendered a decree adjudicating it. Counsel now say that he was mistaken, and that there was another question presented, which he should also have decided. They say that complainant prayed that the bonds be declared invalid for all purposes and at all times, and that the court should have enjoined their issuance, not merely during the life of the franchise, but perpetually. The court on the contrary held that the only real question presented was whether or not the bonds might be issued for the purpose of building a waterworks system during the life of the franchise, and, therefore, limited the relief granted to an injunction against their issuance for that purpose. It, therefore, denied the relief prayed for, insofar as concerns the general question of the validity of the bonds, and there can be no doubt whatsoever that an appeal lay from its decree thus denying this relief.

On page 24 of the brief in support of the motion to dismiss, a number of cases are cited, which are said to be illustrative of the principal that an appeal can only be taken from an adverse decision. With all due respect to counsel, we are wholly unable to appreciate their relevancy. They do not purport to decide when appeals or cross appeals may be taken, but simply announce the elementary principal that relief cannot be granted by an appellate court to an appellee unless a cross appeal is taken. Inasmuch as the appellee in this case has claimed no relief, they have, we submit, no conceivable relevancy to the issues presented in this case.

We submit that there can be no doubt whatsoever that appellee could have appealed from the decree and could have assigned as error "that the court erred in refusing to decree the bond election void and to enjoin the city from issuing bonds thereunder at any time and for any purpose."

As we have pointed out, the court decided what it considered the only real question presented, and held that it was not necessary to "consider" the other questions. Of course, what was meant was that it was not necessary to *decide* the other questions. The entire case was presented and must necessarily have been considered in order to determine what was the real question involved. The District Court, therefore, undoubtedly did consider whether or not the entire bond election should be decreed invalid, and concluded that it should not for the reason that this question was not really involved. Having taken jurisdiction of the controversy, in the exercise of its judicial discretion, it determined what was necessary to its decision and decreed accordingly.

If it had refused to proceed to final hearing it might have been compelled by mandamus so to do, a writ of mandamus when addressed to inferior tribunals being very much like a writ of procedendo. We refer to the following decisions of this court as illustrating the proper function of writs of mandamus when addressed to inferior tribunals:

Ex p. DeGroot, 6 Wall. (U. S.) 497.

Ex p. Whitney, 13 Pet. (U. S.) 404.

Ex p. Bradstreet, 7 Pet. (U. S.) 634.

Ex p. Hoyt, 13 Pet. (U. S.) 279.

In re Bardett, 127 (U. S.) 771.

Patent Com'rs. vs. Whiteley, 4 Wall. (U. S.) 522.

Ex p. Russell, 13 Wall. (U. S.) 664.

Ex p. Newman, 14 Wall. (U. S.) 152.

Ex p. Taylor, 14 How. (U. S.) 3.

Ex p. Flippen, 94 (U. S.) 348.

Ex p. Schwab, 98 (U. S.) 240.

- Ex p. Denver, etc., R. R. Co., 101 (U. S.) 711.
- Ex p. Perry, 102 (U. S.) 183.
- Ex p. Des Moines, etc., R. R. Co., 103 (U. S.) 794.
- Ex p. Burtis, 103 (U. S.) 238.
- Ex p. Baltimore, etc., R. R. Co., 108 (U. S.) 566.
- Ex p. Morgan, 114 (U. S.) 174.
- Ex p. Brown, 116 (U. S.) 401.
- Ex p. Parker, 120 (U. S.) 737.
- In re Burdett, 127 (U. S.) 771.
- Parker petitioner, 131 (U. S.) 221.
- In re Hawkins, 147 (U. S.) 486.
- In re Morrison, 147 (U. S.) 14.
- American Constr. Co. vs. Jacksonville R. R. Co., 148 (U. S.) 372.
- In re Humes, 149 (U. S.) 192.
- In re Parsons, 150 (U. S.) 150.
- In re Rice, 155 (U. S.) 396.
- In re Atlantic City R. R. Co., 164 (U. S.) 633.

In not one of these cases was there any intimation that mandamus could be used for the purpose now suggested. They not only enunciate the principles above alluded to, but the further one that mandamus will never lie to an inferior court when a remedy by appeal exists. As we have said, either the receiver or Miss Boykin could clearly have appealed from the decree upon the ground that it did not grant the relief prayed for insofar as concerned the proper conduct of the bond election and the validity of the bonds. We submit that counsel wholly misconceive the situation when they say that this question was not decided at all merely because the decree did not in terms dismiss the bill of complaint as to it, or on the other hand grant the relief prayed for. The very fact that the relief prayed for was not granted was in itself a decision that complainants were not entitled to it. The District Court held that the only real question presented was whether or not the city could build waterworks and issue bonds to secure funds so to

do, before the expiration of the franchise, and accordingly limited its injunction to a prohibition against such action. According to appellee's theory, this was error, for the reason that he was entitled to a broader injunction prohibiting the city from issuing bonds at any time or for any purpose. It was wholly within his power to have taken either a direct or a cross appeal and have assigned the court's failure to grant the relief prayed for as error.

The cases cited by counsel as to the power of a superior court to compel an inferior tribunal to decide questions by writ of mandamus are not at all in point.

In the case of *ex parte Russell*, 13 Wall., 664, the court had declined to hear and consider a matter alleging its own incompetency, and inasmuch as no decision was rendered at all, but there was a mere refusal to entertain a cause properly presented, it was held that mandamus might issue.

In *Crawford vs. Haller*, 111 U. S. 796, there was a refusal to hear and decide a case, and accordingly it was held that mandamus was the proper remedy.

In *In re Parker*, 131 U. S. 221, the inferior court had refused to take jurisdiction when by law it ought to have done so, and the court held that it should be compelled by mandamus to perform its duty in this regard.

These cases are wholly dissimilar from the one at bar. The District Court did not refuse to entertain jurisdiction or to consider the entire controversy. In the exercise of its discretion, it concluded that but one question was really presented, and that it was unnecessary to decide any other matter, and its decree was entered in accordance with its opinion. If this constituted error the remedy was not by mandamus but by appeal. The judicial discretion was exercised, and it cannot be controlled or reviewed otherwise than by appeal.

Much is now sought to be made out of the connection of Miss Boykin with the case as a party complainant, although heretofore counsel have apparently forgotten her very exist-

ence. She filed a petition of intervention, but was not made a party to the case until the very day of trial. No depositions whatsoever were taken in her behalf. The receiver having sued as a taxpayer, she was permitted to intervene in a similar capacity, but counsel are wholly mistaken when they say that she "did not pray any relief whatever predicated upon the question of res adjudicata or upon the terms of the Bullock franchise."

It appears from the original and amended bills of complaint that the jurisdiction of the District Court was invoked upon three separate grounds. It was first set out that the District Court in the prior cause known as No. 41 Equity, which was afterwards affirmed on appeal by this court, had held that the city had no right before the expiration of the franchise to erect a waterworks system, and it was alleged that its attempt to do so at this time was a violation of the injunction granted in that cause, and that for this reason it should not be permitted to issue the proposed bonds. Diversity of citizenship was also alleged, and the receiver claimed that as a taxpayer he had the right to attack the validity of the bonds. In the amended bill of complaint it was set up that the franchise constituted a contract between the water company and the city, that by its terms the city was precluded from erecting waterworks before its expiration, and that the ordinances looking to the proposed bond issue were, therefore, laws impairing the obligation of the contract in violation of Section 10 of Article 1 of the Constitution of the United States.

Miss Boykin in her petition of intervention (R. p. 89) set out "that the facts stated in the original bill of complaint filed herein and in the amended and supplemental bills of complaint herein apply to petitioner the same as to complainant except so much and such parts of said bills as set up and plead a former adjudication in favor of the Vicksburg Water Works Company; wherefore petitioner adopts as her own all the averments of said bills except so much and such parts thereof as

set up and plead said former adjudication, the same as if she had fully set out the said averments herein."

It thus appears that she adopted the allegation of the original complainant that the proposed bond issue should be enjoined because it was a violation of the terms of the franchise in contravention of the Constitution of the United States. She expressly adopted all of the averments except those which set up the plea of *res adjudicata*, and we, therefore, repeat that counsel are mistaken when they say that she prayed no relief predicated upon the terms of the Bullock franchise. Whether or not she had the right to rely upon the alleged infringement of the franchise is not the question. She did in fact base a claim of right thereon, and when the District Court decreed that the bonds could not be issued during the life of the franchise it did in fact adjudicate the claim thus adopted by her.

Aside from all this, as an intervenor she merely attached herself to the case made by the original complainant, and had no right to any further relief than that prayed for by him. Counsel proceed upon the assumption that there were two suits pending, one brought by the receiver and one by Miss Boykin, and that each was entitled to a final decree. Of course, there was but one suit and there could be but one final decree. We submit that the intervention of Miss Boykin has no conceivable bearing upon the question as to the finality of the decree which was rendered. The District Court took jurisdiction of the entire controversy, including her petition, and concluded that only one question was properly presented, which question it determined. If Miss Boykin was entitled to any further or additional relief than that granted, she was at perfect liberty to appeal.

It is interesting in this connection to note the elusive nature of Miss Boykin's connection with the case at bar. As we have said, she was made a party complainant only on the day the case came on for final hearing. While she seems, from the manner in which her petition of intervention is signed, to have been represented by Messrs. J. C. Bryson and J. Hirsh, who

were and are also counsel for the receiver, the motion entered to dismiss the appeal in the Circuit Court of Appeals was carefully framed so as to be made on behalf of the receiver alone (R. p. 224.) She had evidently not then discovered that the District Court had refused to consider her petition or to adjudicate her rights, or that any wrong whatsoever had been done her. In view of the fact that the decree was drawn by her own attorneys, this is not remarkable.

In the briefs filed by counsel for the receiver, who are also counsel for Miss Boykin, in the Circuit Court of Appeals, both on the merits and on the motion to dismiss, Miss Boykin's name was not mentioned. Indeed, in the statement of facts contained in the briefs no allusion was even made to the fact of her intervention. Both briefs were filed on behalf of the receiver alone. The motion to dismiss not only was made in the name of the receiver alone, but did not set up the ground now so urgently pressed that the decree of the District Court was not final. On the other hand, it proceeded solely upon the ground that the bill was only ancillary to the original proceeding in Cause No. 41 Equity and that neither the District Court nor the Circuit Court of Appeals had power to modify or construe the mandate of this court issued therein, and the latter was, therefore, without jurisdiction of the appeal. It was thus conceded that the decree of the District Court was in fact final, and the Circuit Court of Appeals was urged to affirm it, which it accordingly did. Having procured this affirmance, counsel now for the first time discover that the decree of the District Court was not final. Of course, if this be so, it should never have been affirmed.

It is, we submit, too late for appellees, or either of them, to make the point that the decree of the District Court was not final. As we have said, an appeal was prosecuted from that decree to the Circuit Court of Appeals, where it was affirmed. If the decree of the District Court was not final that objection should have been advanced in the Circuit Court of Appeals. The appeal now is not from the decree of the District Court,

but from that of the Circuit Court of Appeals affirming it, and it is not even contended that the decree now appealed from is not final in the sense that it is an entire disposition of the controversy. Of course, we do not mean that it is final in the sense that no appeal lies to this court, but we do insist that it is a "final decree."

If appellee's motion to dismiss this appeal should be sustained on the ground that the decree of the District Court was not final, the effect would be to leave in full force the decree of the Circuit Court of Appeals affirming that of the District Court, and there would, therefore, be no power in the District Court to make its decree final. Appellee could not resort to the remedy by mandamus, as suggested by counsel, even if it were appropriate to compel the District Court to decide the points which it determined were not necessarily involved, for the reason that its decree, having been affirmed by a higher tribunal, it has, of course, lost all control over the case. If, in fact, the decree of the District Court was not final no appeal would lie therefrom to the Circuit Court of Appeals, and when that court affirmed a decree from which no appeal could have been taken, it committed error, and its decree of affirmance should not be permitted to stand, but should be reversed. The effect of a dismissal of the present appeal would be, not to remand the case to the District Court for further proceedings, but to prohibit the rendition of a final decree. On the other hand, appellees are in no position to insist that the Circuit Court of Appeals erred in affirming the decree of the District Court, for the reason that no cross appeal has been taken.

Aside from this, however, there can be no doubt, we submit, that they have waived all right to contend that the decree of the District Court is not final by not making the point in the Circuit Court of Appeals.

SECOND.

THE DECREE OF THE CIRCUIT COURT OF AP-

PEALS IS NOT FINAL IN THE SENSE THAT NO APPEAL LIES THEREFROM TO THIS COURT.

It is contended that the jurisdiction of the District Court was invoked solely on the ground of diversity of citizenship, and that, therefore, the decree of the Circuit Court of Appeals is final. It is conceded in the brief in support of the motion to dismiss, that if jurisdiction of the controversy could have been maintained by the District Court without any averment of diverse citizenship, an appeal lies to this court from the decree of the Circuit Court of Appeals. The original bill of complaint was filed on March 2, 1912, (R. p. 2), and what was denominated an "amended and supplemental bill," was filed on May 6, 1912, (R. p. 49.) The original bill alleged that the receiver was a citizen of the State of Tennessee and, therefore, a citizen of a different state from the Mayor and Aldermen of the City of Vicksburg, a municipal corporation under the laws of the State of Mississippi, and jurisdiction was invoked upon this ground. It also alleged that among the properties of the Vicksburg Water Works Company, of which complainant was receiver, was a franchise, by which was granted the exclusive right to erect waterworks for thirty years from November 18, 1886, and that in a former litigation between the Vicksburg Water Works Company and the City of Vicksburg, described as No. 41 Equity, which was affirmed on appeal to this court, the City of Vicksburg was enjoined from building waterworks during the life of the franchise. It alleged that an election had been held at which bonds were authorized to be issued to secure funds to build waterworks before the expiration of the franchise, that this was a violation of the said injunction and that, therefore, the defendant was in contempt of court, and the bond election should be declared void and held for naught. The allegation as to this is as follows: (R. p. 7.)

"Complainant is advised that under the circumstances the calling of the said election, at said time,

for the purpose aforesaid, is a violation of the said injunction of this Honorable Court, as set out and provided in the final decree in said cause No. 41 Equity, and the said defendant city and its Mayor and Aldermen, are each and all severally in contempt of this Honorable Court in calling and holding the said bond election and in seeking to issue the said bonds at the present time for the purpose aforesaid, and the complainant is entitled to have each and all of them cited as and for contempt of this Honorable Court, and to have the said bond election declared void and held for naught."

It thus appears that the claim was made in the original bill that the city's right to erect waterworks before the expiration of the franchise had already been determined in a former proceeding between the same parties and was, therefore, *res adjudicata*, and it was this contention which was upheld by the District Court and made the basis of the injunction granted by it. The Circuit Court of Appeals based its affirmance of the decree upon this ground alone.

It is a little singular, we submit, that although the decree appealed from was rendered and affirmed upon the sole ground of a prior adjudication, it is now said that jurisdiction depended upon diverse citizenship alone. There can be, we think, no doubt that if there had been no allegation of diverse citizenship, the District Court would have had jurisdiction of the cause by reason of the averment that in a prior proceeding between the same parties it had been decreed that the city had no right to erect waterworks before the expiration of the franchise, and was enjoined from so doing. It needs no citation of authority to maintain the principal that a court always has jurisdiction to protect and enforce its own decrees. This court has many times held that such jurisdiction exists independently of diverse citizenship in an ancillary proceeding. It has also frequently held that where the original cause depended upon some ground of federal jurisdiction other than diverse

citizenship an ancillary proceeding would relate back and be upheld upon the same jurisdictional grounds. The record shows that Cause No. 41 Equity was founded upon an alleged impairment of the franchise or contract of the Vicksburg Water Works Company by the proposed building of a competing waterworks system, and that it was specifically averred that the ordinances and resolutions looking thereto were in violation of Section 10, Article 1, of the Constitution of the United States. Inasmuch, therefore, as the original bill in this cause was filed for the purpose of enforcing the decree in Cause No. 41 Equity, the situation is precisely the same as if a constitutional right had been set up in the original bill itself. It follows from what we have said, that the jurisdiction of the District Court as invoked in the original bill, depended both upon diversity of citizenship and upon the exercise of its ancillary jurisdiction to enforce a former decree.

Counsel cite cases holding that a suit upon a judgment is not such an appeal to the ancillary powers of the Federal Court as to give jurisdiction. This is, of course, true. They also cite cases holding that because in a different controversy between other parties certain principles have been enunciated, jurisdiction does not exist in the Federal Courts whenever the same questions of law are involved. Of course, we concede this to be true. They also argue at length that the pleading of a former decree of a Federal Court and a prayer for relief based thereon cannot be construed as involving a construction of the laws of the United States, and this also we concede to be true. Cases are cited as holding that federal jurisdiction does not exist because the suit was brought by a receiver appointed by a Federal Court, and we make no contention to the contrary. Not one authority is cited, however, as holding that federal jurisdiction does not exist where the claim is advanced that precisely the same matter has already been adjudicated by the same court in a prior proceeding between the same parties, and where the prayer for relief is predicted upon the enforcement of that decree.

It would seem from the brief on the motion to dismiss this appeal, that counsel wholly fail to appreciate that in their original bill of complaint they appealed to the ancillary jurisdiction of the District Court to enforce a former decree. And yet in the briefs heretofore filed by them they have indicated a full understanding of this fact. In a brief filed in the District Court by Messrs. J. C. Bryson and J. Hirsh, whose names are also signed to the brief on the motion to dismiss this appeal, they said in seeking to distinguish the case at bar from one heretofore decided by this court and cited by us:

"In the case at bar federal jurisdiction is invoked upon three separate grounds:

"1. Impairment of the contract.

"2. The right of this court to protect its former decree.

"3. Diversity of citizenship."

When the appeal was taken to the Circuit Court of Appeals they were even more strongly impressed with the importance of their invocation of the ancillary powers of the District Court as a ground for maintaining jurisdiction. Indeed, the motion to dismiss that appeal made by them was predicated upon the theory that the true construction and interpretation of the original and amended bills of complaint was that they were founded upon nothing else than an appeal to the ancillary jurisdiction of the court. The motion to dismiss was as follows: (R. p. 224.)

"And now into court, by his undersigned counsel, comes W. A. Henson, receiver in the above entitled cause, and moves the court to dismiss the appeal taken

1.

herein by said Mayor and Aldermen, for the reasons following, that is to say:

"It is manifest from the record, proceedings and final decree of the court below that, in decreeing the injunction complained of, the said District Court of the United States merely enforced and gave effect to its former decree in a certain suit that depended in said District Court (then Circuit) Court of the United States, in which the Vicksburg Water Works Company, now represented by the appellee, Henson, its receiver, was complainant, and said appellant was defendant, in No. 41 upon its equity docket and to the mandate of the Supreme Court of the United States, upon its judgment and decree affirming said final decree of said Circuit Court, upon the appeal of said Mayor and Aldermen, the present appellant, therefrom, so that this Honorable Court is without jurisdiction of this appeal.

2

"This Honorable Court is without jurisdiction to revive, modify or limit the said judgment or decree of said Supreme Court, so affirming said decree of said Circuit Court, enjoining the appellant herein from constructing waterworks in said City of Vicksburg, during the existence of the said exclusive franchise of said Water Works Company, which expires November 18th, 1916.

3

"Inasmuch as the decree appealed from, at the suit of said receiver of said Vicksburg Water Works Company, merely enforced and gave effect to said former decree, and to said mandate of the Supreme Court affirming the same, no appeal lies to this Honorable

Court, but only to the Supreme Court of the United States.

"For other and manifest reasons appearing upon the face of the record.

(Signed)

"HIRSH, DENT & LANDAU,

(Signed)

"J. C. BRYSON,

(Signed)

"T. M. MILLER,

"Counsel and Solicitors for Appellee."

It thus appears that in order to procure a dismissal of the appeal to the Circuit Court of Appeals counsel argued that the proceeding was merely ancillary and did not at all depend upon diversity of citizenship. They cited many cases upholding the ancillary jurisdiction of federal courts to enforce their own decrees, and to show that the present proceeding was an ancillary one. They have now discovered that the cause was in no sense ancillary and that it depended, therefore, solely upon diversity of citizenship. An inspection of the pleadings demonstrates, we submit, that the analysis of the jurisdictional grounds contained in the brief filed in the District Court is correct, and that jurisdiction did in fact depend, first, upon diversity of citizenship, second, upon the enforcement of the prior decree, and, third, upon the allegation of a constitutional right.

We have heretofore discussed only the jurisdiction of the District Court as depending upon the allegations of the original bill of complaint. We do not, however, at all concede counsel's contention that only the original bill can be looked to to determine whether this appeal lies. The amended bill covers precisely the same ground as the original bill, except that it bases a claim of right upon Section 10 of Article 1 of the Constitution of the United States. It sets up no new matter as having arisen since the filing of the original bill, nor does it contain a single new allegation of fact. The original bill averred the existence of the franchise or contract between the Water

Works Company and the city, and its alleged breach by the proposed issuance of bonds. It did not, however, specifically aver that the franchise constituted a contract between the parties, and that the ordinances and resolutions looking to the bond issue were laws impairing its obligation in violation of the Constitution of the United States. The only difference, therefore, between the two bills, insofar as concerns the jurisdictional averments, is that the original bill, while it asserted the facts upon which a constitutional right was later claimed, did not with technical precision aver the existence of such a right.

Counsel say that only the original bill can be looked to, because it is only by it that the jurisdiction of a court is invoked, and they cite a number of decisions of this court, holding that where a party complainant enters a District Court upon the sole ground of diverse citizenship, and in the subsequent proceedings it develops, by way of defense or otherwise, that another federal question exists, an appeal can be taken either to this court or to the Circuit Court of Appeals, but that if it be taken to the latter tribunal its decree is final. This, we, of course, concede to be the law. It has never been held, however, that where, as in the case at bar, an amended bill is filed, setting up no new matters of fact, but correcting an inadvertent failure to present in precise terms a federal question, the original bill alone can be looked to in determining the right of appeal to this court.

While counsel denominate their second pleading an amended and supplemental bill, it is in fact, we submit, an amended bill, because it sets up no new matters whatsoever. It has always been held that an amended bill or declaration speaks as of the date of the original pleading. In *Baltimore & Ohio R. R. Co. vs. McLaughlin*, 73 Fed., 519, the court, in an opinion by Taft, Circuit Judge, dealing with a similar question, held that the amended petition in that case was merely an addition to the original of an averment with reference to citizenship; that it was simply an amendment

thereof which had relation in point of date to the time of its filing; that it must be construed as of the date of the original petition, and be given effect as if the proper averment of diverse citizenship had been made a part thereof. It was said that it would be improper in an amendment to the petition for the plaintiff to aver a fact which happened subsequent to its filing; that a pleading averring such a fact would be a supplementary petition, and not an amendment to the original petition. The opinion of Judge Caldwell, in *Bowden vs. Burnham*, 59 Fed., 752, was quoted as follows:

"But the court very properly granted the plaintiffs leave to amend their complaint, and it was amended. Nevertheless, the plaintiff in error asserts that as the complaint at the time the attachment was issued, did not contain the necessary jurisdictional averments, every step taken in the cause prior to the amendment was void, and that the amendment of the complaint could not impart vitality or validity to anything done before the amendment was made. This contention is wholly untenable. It is everyday practice to allow amendments of the character of those made in this case, and when they are made, they have relation to the date of the filing of the complaint, or the issuing of the writ or process amended. When a complaint is amended it stands as though it had originally read as amended. The court in fact had jurisdiction of the cause from the beginning, but the complaint did not contain the requisite averments to show it. In other words, the amendment did not create or confer the jurisdiction; it only brought on the record a proper averment of a fact showing its existence from the commencement of the suit."

This court has held that where there was a failure in the original bill or petition properly to allege diversity of citizenship, such defect was curable by an amendment, and it necessarily follows that such an amendment, when filed, dates

back to and speaks as of the original petition. *Howard vs. De Cordova*, 177 U. S., 609.

If counsel's contention is correct that the jurisdiction of a trial court is invoked only by the original pleading, a defect therein could never be cured by amendment. The cases cited in support of their announcement are not at all in point. They chiefly relate to the injunction of federal questions defensively. Only two of them concern the raising of additional federal questions by a complainant by supplemental pleadings, and in both new matters were brought into the controversy which did not exist at the time of the filing of the original bill. Thus, in *Third St. & S. R. R. Co. vs. Lewis*, 173 U. S., 457, a supplemental bill was filed by which a new defendant was made a party, and the court held that inasmuch as the situation as it existed at the outset did not warrant the raising of a federal question other than diverse citizenship, the decree of the Circuit Court of Appeals was final. There was no attempt to amend the original bill by supplying a defect in the assertion of legal rights which depended alone upon the state of facts already averred. An entirely new situation was developed by the joining of the new party defendant, and the court, therefore, said that because the federal question had only developed in the subsequent proceedings the jurisdiction of the court could not be said to have been invoked upon that ground.

Again, in *St. Louis R. R. Co. vs. Wabash R. R. Co.*, 217 U. S., 247, the cause proceeded to a final judgment, and an appeal was taken to the Circuit Court of Appeals, which reversed with leave to amend, and by amendment an additional federal question was sought to be raised. It was held that because this had not been done at the outset, but had only developed in the subsequent proceedings, an appeal could not be taken to this court. This case was, we submit, very different from the one at bar. It would be a singular situation if a party could file a bill of complaint one day and the next day amend by alleging a federal question other than diversity of citizenship

and thus create a right of appeal different from that which would have existed if the whole case had been developed in the original bill.

The latest decision of this court upon the question now under discussion is found in *Shulthis vs. McDougal*, 225 U. S., 561, in which it was said :

"Whether the jurisdiction depended on diverse citizenship alone, or on other grounds as well, must be determined from the complainant's statement of his own cause of action, as set forth in the bill, regardless of questions that may have been brought into the suit by the answers or in the course of the subsequent proceedings."

Colorado Cent. Consol. Min. Co. vs. Turck, 150 U. S. 138.

Tennessee vs. Union & Planters' Bank, 152 U. S., 454.

Spencer vs. Duplan Silk Co., 191 U. S., 526.

Devine vs. Los Angeles, 202 U. S., 313-333."

When the amended bill of complaint was filed no proceedings whatsoever had been had except that an answer had been filed to the original bill. No depositions had been taken; no order had been entered, and the relative situation of the parties was precisely the same as at the date of the filing of the original bill. Under these circumstances, we submit that the jurisdiction of the court was in fact invoked at the outset upon the grounds set up in the amended, as well as the original bill of complaint.

Counsel now suggest, however, although they do not argue it, that the amended bill of complaint sets up no claim of right under the Constitution. We are at a loss to understand how such a conclusion is reached. We quote from the amended bill as follows: (R. p. 51.)

"That the said defendant having precluded itself from becoming the owner of a waterworks system dur-

ing the life of said franchise contract, any attempt upon its part to construct a syste mof water works upon its part to construct a system of water works system, except by purchase of the Bullock system within said period, necessarily impairs the obligation of said contract, and is therefore in violation of Sec. 10 of Art. 1 of the Constitution of the United States, which provides as follows:

“No State shall * * * pass any * * * law impairing the obligation of contracts.”

As the jurisdiction of the District Court was, therefore, invoked to enforce a claim of right under the Constitution of the United States, it cannot be said that it depended solely upon diversity of citizenship, and we submit that an appeal, therefore, lies to this court even without regard to the ancillary feature of the proceeding.

Respectfully submitted,

T. C. CATCHINGS,

O. W. CATCHINGS,

GEORGE ANDERSON,

JOHN BRUNINI,

Solicitors for Appellant.

Office Supreme Court, U. S.
FILED.

OCT 14 1913

JAMES H. MCKENNEY,

CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1913.

No. 546.

MAYOR & ALDERMEN OF THE CITY OF VICKSBURG,
Appellants,
against

W. A. HENSON, RECEIVER OF THE VICKSBURG WATER
WORKS COMPANY, ET AL., *Appellee.*

REPLY BRIEF IN SUPPORT OF MOTION TO DIS-
MISS APPEAL.

EDGAR H. FARRAR,
J. C. BRYSON,
JOSEPH HIRSH.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1913.

No. 546.

MAYOR & ALDERMEN OF THE CITY OF VICKSBURG,
Appellants,
against

W. A. HENSON, RECEIVER OF THE VICKSBURG WATER
WORKS COMPANY, ET AL., *Appellee.*

**REPLY BRIEF IN SUPPORT OF MOTION TO DIS-
MISS APPEAL.**

On page 3 of Appellant's brief against the motion to dismiss the appeal herein it is said:

"The District Court sustained the contention of complainant, and enjoined the city from erecting water works at all during the existence of the franchise and from issuing bonds for that purpose. It was thus enjoined from doing the only thing it contemplated doing."

The fact is complainant's bill set up *two* contentions (Rec., pp. 2 to 9, inclusive):

1st. As the owner of the Bullock franchise he sought to have the appellant enjoined from building a water works because it had already been adjudicated between him and the appellant that by virtue of the said franchise appellant was precluded from building a water works; Second, as a *taxpayer* he sought to have the appellant restrained from issuing and selling bonds under a certain election, alleged to be void.

Two separate and distinct invasions of his rights were thus set up. The first was independent of the second not only in that it was based upon his rights under the franchise and a certain adjudication thereon, but in addition it was not limited to funds raised by the sale of bonds but sought as well to prevent the building of water works out of funds then on hand or which might thereafter be raised from current taxation, but was limited in point of time to the expiration of the franchise.

The second ground of relief was entirely independent and exclusive of any right he might possess under the franchise in question and was based solely upon his rights as a taxpayer and under it he sought to prevent the sale of bonds under the election in question, to raise funds to build a water works at any time without reference to the franchise. This branch of relief was predicated solely upon the *invalidity* of the election as to which he claimed that the appellant had not complied with the law in calling and holding the said election, and had used fraudulent, corrupt and improper means to control the result of the same.

Complainant might have presented the *separate* grounds of relief against the appellant in *separate* and *distinct suits* had he chosen to do so. The only point of similarity arose from the fact that under each ground of relief set up by him he prayed for an injunction against the appellant restraining it from doing the thing complained of. Under this

state of facts how can it be said "The District Court sustained the contention of complainant" or that the city "was thus enjoined from doing the only thing it contemplated doing."

The injunction actually given by the court was *limited* to complainant's rights as a *franchise owner*, otherwise the court would have enjoined the issue and sale of the bonds for *all time* instead of *limiting* it as he did (Rec., p. 205) to a sale of the bonds "with a view of constructing a water works system * * * *during the life of the said franchise*, that is between now and the 18th day of November, 1916."

This relief was appropriate to the *rights predicated on the franchise*. The issue and sale of bonds to build a water works immediately would violate the franchise rights the same as to build out of current funds. If the injunction had prohibited the appellant from selling the bonds prior to the termination of the franchise as counsel for appellant contend that it did the decree would probably be broader than the averments *under this ground for relief* would sustain, but the injunction did not go to that extent. An inspection of the Court's decree found in the record on page 205 will disclose that the injunction is *limited to a sale with the view of constructing during the life of the franchise*.

Appellant on the same page of brief (3) further says:

"It thus appears that while a single invasion of complainant's rights was alleged, it was contended that the contemplated action of the city was illegal for two reasons."

This excerpt contains the same error as that above. Two invasions of complainant's rights were clearly set up: First, the building of water works prior to November 18, 1916,

out of the current funds or otherwise contrary to the terms of the Bullock franchise and the adjudication thereunder. Second, the threat to issue and sell bonds under an election alleged, as a taxpayer, to have been illegally called and fraudulently and corruptly conducted and therefore void.

Appellant on page 4 further says:

"Counsel say that complainant had the right to have determined the abstract question as to whether or not the bonds might be issued after the expiration of the franchise, because of the alleged irregularity in the proceedings looking to their issuance, and they say that the city's rights in this particular may be subject of future litigation, and that, therefore, the decree is not final."

An inspection of our brief will show that we made no such argument. However, if it were true it could not affect the finality of the decree. The issue and sale of bonds was not merely an abstract question which might arise after the termination of the franchise nor could the decree of the District Court make it such. The argument, however, is fallacious on the further ground that the District Court made no such decree. The actual decree rendered as shown above does *not prohibit* the *immediate issue and sale* of the bonds in question, but merely provides that they cannot be sold *with a view of erecting a water works prior to the end of the franchise*. Should the bonds be sold now, as they might under the decree, or at any time prior to the end of the franchise complainant *as a taxpayer* would become liable to have the property taxed to pay interest on the bonds and also to pay the principal thereof at maturity. This threatened danger cannot be abstract. On the contrary it must be concrete and is alleged to be imminent.

On pages 4 to 7 (appellant's brief) counsel review the

authorities cited by us in our printed brief on the motion to dismiss and conclude that they have no "conceivable" application because "in each and all of them the decree appealed from reserved the cause for future consideration and did not even purport to be a final adjudication of the controversy."

The reservation *vel non* of the lower court is not an absolute test of the finality of its decree any more than the taxing of costs would be. Reservation of jurisdiction is one of the badges only of finality and yet reservation of ministerial questions merely do not prevent the decree from being final.

This was held in *Forgay v. Conrad*, 6 How. (U. S.), 201, 12 L. Ed., 404, and other cases following, particularly *St. Louis, etc., R. Co. vs. So. Express Co.*, 108 U. S., 24-27, L. Ed., 638.

The *substance* of a decree alone determines its finality and not what the court rendering it thought it to be.

The cases cited in our original brief laid down the rules adopted by this court for testing a decree as to whether or not it is final. One of the rules thus laid down is to the effect that *every issue raised by the pleadings must be determined*, otherwise the decree cannot be final. Appellant's brief does not undertake to answer this test, or even to mention the rule or to deny that it was so stated in the cases cited by us in our principal brief.

If this were not an absolute test of finality it must necessarily follow that successive appeals could be prosecuted from each and every adjudication of a distinct issue raised by the pleadings in an equity suit.

Counsel for Appellant further say (p. 6 of brief):

"As the matter stands, however, there can be no further order entered in the controversy, and, therefore, no other appeal taken. So far as the District

Court is concerned, the matter is closed, and the decree, whether or not it rightfully or wrongfully failed to dispose of every contention presented, is none the less a final decree and subject to appeal."

The argument is purely the *ipse dixit* of counsel. It begs the question at issue by declaring to be true that which counsel undertake to prove to be true.

On the same page (6) counsel further say:

"Certainly if the decree is not a final one it is an interlocutory one, and it cannot be this unless the court has power by subsequent proceedings to render a final decree."

We reply that we shall certainly not deny that the decree is not either final or interlocutory and we submit that if interlocutory there was only jurisdiction for the appeal to the Circuit Court of Appeals on an interlocutory injunction and none from the Circuit Court of Appeals to this Court so that the court below must still have jurisdiction to render a final decree on the merits.

Counsel further say (p. 7 of their brief):

"In the case at bar the cause was set down for final hearing, was argued, submitted to and considered by the court, and what purported to be a final decree was rendered. Nothing was reserved for future action or consideration, but the court in its opinion expressly stated that it had decided what seemed to it, in the exercise of its judicial discretion, to be the only real question presented."

We submit that neither the setting down of the case for final hearing, nor argument thereon, nor the submission to that end, nor the consideration of the Court, nor all of them

are made the test of the finality of the decree actually rendered. Finality must be determined by the *substance* of the decree itself and not otherwise. Neither does the opinion of the Court rendering the decree determine its finality. As to this point, however, we desire to direct the attention of the court to the fact that the opinion is not so strong as indicated by the language of appellant's brief. The opinion will be found in the Record on pages 206-210 inclusive.

We quote from the opinion at the bottom of page 207 of the Record, as follows, to wit:

"The only question presented in the present controversy that this Court thinks it necessary to consider, is whether this matter has been determined by a former decree of this Court and affirmed by the Supreme Court of the United States in *Vicksburg vs. Vicksburg Water Works Company*, 202 U. S., 460."

We quote further from the opinion on page 210 of Record, second paragraph from bottom, to wit:

"Believing, as we do, that the real question here presented has been decided in express terms by this Court, and affirmed by the Supreme Court of the United States in 202 U. S., 458-472, and is *res judicata*, it is not necessary to consider any other question presented by learned counsel."

Construing these ~~two~~ quotations together we submit that it cannot be said that the District Court decided the *only real question* which he considered to be in the cause.

In the first quotation he says: "The only question * * * this Court thinks is necessary to consider is" etc.

This necessarily implies that there are other questions presented in the controversy which he did not *even consider* because he did not think it necessary to determine them, and

because he considered the question of former adjudication paramount.

We do not even consider that the last quotation found on page 210 properly bears the construction given by appellant. The word "real" is not used we submit in the sense of only, but rather in the sense of main, or most important, or paramount, or something of that sort. The meaning attributed to the word by counsel for appellant is not the usual, obvious and customary meaning given to the word and certainly not the meaning that should be given to it when considered in connection with the quotation above set out from p. 207 of the Record. The word "only" is interpolated before the word "real" in the Court's opinion as if to strengthen the opinion in this connection.

Referring to the quotations above appellants say on page 8 of their brief, "The only real question involved," "the only real question presented." On page 9, "The only real question presented." (P. 10) "The only real question presented." On page 11, "But one question was really presented." As if counsel sought to impress the Court by the repetition of this, as it seems to us, erroneous interpretation of what the District Court actually said.

Counsel for appellant are correct that our former brief was in error in stating that Mrs. Boykin did not adopt any part of complainant's bill except such as was predicated on the invalidity of the bond election. We cheerfully confess that this was an oversight upon our part. Mrs. Boykin having no interest in the franchise, had no right to predicate relief either on the franchise or upon any adjudication pertaining to the same, but as a taxpayer she had the right to complain of the invalidity of the bond election. In drawing her petition by oversight of counsel she only excepted from it the question of *res adjudicata*, which, of course, made her adopt the averments predicated on the franchise as well as on the bond election. This was a harmless over-

sight by the pleader and as we see it does not now affect the issues before this Court.

Counsel further say (p. 13 of brief):

"Aside from all this, as an intervener she merely attached herself to the case made by the original complainant, and had no right to any further relief than that prayed for by him (Henson, Receiver)."

This is true, but it does not follow therefrom that as she had been admitted as a party complainant she was not entitled to have decreed in her favor such relief as was prayed for by the receiver touching the invalidity of the bond election. The order admitting her as a party complainant gave her the same right to relief upon this question that Henson, Receiver, the original complainant, had. The fact that the Court did not consider it necessary in the case of Henson, Receiver, to decree upon the validity of the bond election certainly ought not to deprive her of such relief as might be appropriate on that branch of the case. She was a party to the suit and under the rules laid down in our former brief the case could not go to a final decree without disposing of her rights in some way. *The District Court, as stated by appellant (p. 13 of brief) "took jurisdiction of the entire controversy, including her petition," and having done so they could not divest itself of that jurisdiction by a failure to decide the only issue in the case upon which she could predicate relief.*

As taxpayers she, and Henson, Receiver, had a common interest in the suit, but the decree rendered ignored this and declined and refused to decree anything whatever to either of them as taxpayers. Such a decree, none of the decisions we have been able to find is final, or held to be final, because it fails to close the litigation either as to parties or subject matter. The citations on pages 9 and 10, claimed by ap-

pellant to relate to the proper functions of a writ of *mandamus* have no relevancy or applicability whatever to this case.

UPON THE SECOND GROUND LAID IN THE MOTION VIZ.:
THAT THE DECISION OF THE CIRCUIT COURT OF AP-
PEALS IS FINAL AND THAT NO APPEAL LIES TO THIS
COURT.

The argument on this branch of the case is necessarily predicated on the theory that we are mistaken as to the finality of the decree rendered by the District Court, because if the decree rendered by the District Court is not final then, of course, no appeal lay to the Circuit Court of Appeals, and the attempt to prosecute such appeal, and the judgment rendered thereon being without jurisdiction, are mere nullities.

On page 17 (Appellant's brief) they say:

"It is a little singular, we submit, that although the decree appealed from was rendered and affirmed upon the sole ground of a prior adjudication, it is now said the jurisdiction depended upon diverse citizenship alone. * * * It needs no citation of authority to maintain the principle that a court always has jurisdiction to protect and enforce its own decrees."

While it is true that the decree appealed from was rendered and affirmed upon the sole ground of prior ~~juris-~~ ~~dictio~~ ^{diction}, it is equally true that at least one other ground of relief was set up and prayed for in the original bill. The pleading of the prior adjudication would certainly have given ancillary jurisdiction, but ancillary jurisdiction is limited to the protection of the prior decree only.

The decree in Suit 41, to which the relief sought in the

case at bar is ancillary, or supplemental, had no relation whatever to the rights of the Water Company *as a taxpayer*, nor did it *involve* the *validity* or *invalidity* of the *bond election* which is attacked in the case at bar. The attack on the bond election is entirely extraneous and independent of the relief granted by the decree in Suit 41, which related solely to rights under the Bullock Franchise. It is not ancillary to it nor supplemental thereto, nor affected thereby. It follows necessarily that the ancillary jurisdiction of the Circuit Court could not be invoked for the purpose of adjudicating the validity of the bond election.

In addition to this the Water Company in Suit 41 did not sue as a taxpayer, but as a franchise owner. From this it follows that the relief sought and prayed for in the case at bar by the Receiver in his relation as a *taxpayer* is not ancillary or supplemental to the relief given in Suit 41. It cannot be merely in protection of that decree.

We deem it proper further to call attention to the nature of an ancillary bill. It takes the jurisdiction of the suit to which it is ancillary and needs no other ground of jurisdiction and no other ground can be invoked in support of it. An appeal in an ancillary suit lies necessarily to the same court to which the appeal in the original suit lay. If the case at bar be *considered ancillary* to Suit 41 the *appeal* would *necessarily* be *direct* to the *Supreme Court* of the United States because the jurisdiction of the District Court in Suit 41 was predicated *solely* upon a *Constitutional* question.

We desire further to call the attention of the Court to the fact that the appellate jurisdiction both of the Supreme Court and of the Circuit Court of Appeals is made dependent wholly upon the statutory jurisdiction of the District Court. The ancillary jurisdiction of the District Court is not statutory and is not mentioned in the statute conferring

appellate jurisdiction. The course that an appeal may take, whether to this Court or the Circuit Court of Appeals, can never, therefore, be predicated upon ancillary jurisdiction.

It follows necessarily that in considering whether an appeal lies direct to the Supreme Court, or to the Circuit Court of Appeals, it is never proper to consider the ancillary jurisdiction of the District Court. If the suit in which the decree appealed from is ancillary the jurisdiction of the original suit controls; but if it is original the jurisdictional grounds set up in the bill control. The solution of the question in the case at bar, therefore, depends wholly on whether or not complainant's bill is ancillary or original. If it had sought no other relief than the protection of the decree in Suit 41 it would necessarily be ancillary to Suit 41, and the appeal would have to be determined by the jurisdiction of the District Court in Suit 41. Since, however, complainant, Henson, Receiver, sought other and additional relief, beyond the mere protection of the decree in Suit 41, we think the bill is original and the right of appeal is therefore controlled not by any ancillary jurisdiction but solely by reason of the jurisdictional averment or diverse citizenship set up in complainant's bill.

If we are correct in this it necessarily follows that we may not tack the ancillary jurisdiction of the District Court to its original jurisdiction predicated on diverse citizenship in order to make out a case in which the jurisdiction of the District Court was not dependent entirely upon the opposite parties to the suit being citizens of different States.

On page 19 (Appellant's brief) they further say:

"When the appeal was taken to the Circuit Court of Appeals they were even more strongly impressed with the importance of their invocation of the ancillary powers of the District Court as a ground for maintaining jurisdiction. Indeed, the motion to dismiss that ap-

peal made by them was predicated upon the theory that the true construction and interpretation of the original and amended bills of complaint was that they were founded upon nothing else than an appeal to the ancillary jurisdiction of the court."

It is true that a motion was made by Henson, Receiver, in the Circuit Court of Appeals to dismiss the appeal to that Court, because only the ancillary jurisdiction of the District Court had been invoked in the case at bar. This motion was made out of abundant caution and because *some* of counsel for appellee, Henson, conceived that this Court might take the view that the bill in the case at bar was an ancillary bill and not an original bill. In that case, of course, the appeal would have been *direct* to this court because the jurisdiction of the District Court would have depended upon its original jurisdiction in Suit 41 and not upon any jurisdictional ground laid in the present cause. But the Circuit Court of Appeals adopted the contention of the appellant, and held that the bill in the instant case was an original bill and not an ancillary bill, if their holding was correct, then the appeal must be controlled by the independent jurisdictional ground stated in the present bill. We accept the holding of the Circuit Court of Appeals as correct and submit as a question of law that, being correct, the mere fact that the original bill in the present case set up and plead the decree in Suit 41 as a ground of relief cannot affect the right of appeal or determine whether it shall be directed to this Court or to the Circuit Court of Appeals.

The appellants in their brief in the Circuit Court of Appeals on the *ancillary* feature, said:

"We do claim, however, that the present suit is in *no sense* an *ancillary* suit for the reason that the relief prayed for is claimed upon several grounds which were

not involved and have no relation whatever to the issues presented in the suit to which it is now claimed the present suit is ancillary, and because a total stranger to the first suit is an intervening party complainant in this suit claiming the same relief claimed by the original complainant upon one of the ground above referred to, which was not involved in the original suit and which has no relation whatever to the subject matter of that suit.

Under these circumstances we submit that it is *impossible* that the present suit should be regarded as a proceeding *ancillary* to the former suit.

The relief prayed for in the present suit is claimed on three distinct grounds, to wit:

1st. * * *

2nd. * * *

3rd. Upon the ground that independently entirely of the two grounds above referred to, the complainant, as a taxpayer is entitled to the relief which it seeks because the election under which it is proposed to issue the bonds referred to in the bill of complainant was illegal, void and of no effect.

It further appears that one Leila Boykin, a citizen of Georgia but a taxpayer of the City of Vicksburg, by intervening petition, was made a party complainant in the cause, praying for the same relief claimed by the complainant upon the ground that the election under which the bonds are proposed to be issued was void and of not effect.

Under these circumstances we repeat that it seems to us impossible that the proceeding can be regarded as in any sense a proceeding ancillary to the original suit.

Note how the appellants now face about in their brief before this Court on the motion to dismiss the appeal. On page 18 they say:

"Inasmuch, therefore, as the original bill in this cause was filed for the purpose of enforcing the decree

in Cause No. 41 Equity, the situation is precisely the same as if a constitutional right had been set up in the original bill itself. It follows from what we have said, that the jurisdiction of the District Court as invoked in the original bill, depended both upon diversity of citizenship and upon the exercise of its ancillary jurisdiction to enforce a former decree."

It seems to us that the case of *Lovell v. Newman*, 227 U. S., 412, is conclusive.

The *Lovell* case was a suit by the trustee in bankruptcy to recover a certain consignment of cotton shipped from New Orleans, Louisiana, to a foreign port without the jurisdiction of the United States courts. An appeal was prosecuted from the decree of the District Court to the Circuit Court of Appeals, and from the Circuit Court of Appeals to the Supreme Court of the United States where a motion was made to dismiss for want of jurisdiction on the ground that the decision of the Circuit Court of Appeals was final. We quote from the opinion as follows:

"And it is well settled that this question must be decided, not because of questions which may have arisen or which might arise in the subsequent progress of the case, but upon the grounds of jurisdiction asserted in the petition."

After having set out the substances of the averments set up in the complainant's original petition the opinion proceeds:

"From this recital it is apparent that the proceeding in the United States District Court for the eastern district of Louisiana was ancillary to the original proceeding in the court of bankruptcy in Alabama, where the adjudication was had."

The opinion further proceeds:

"The present suit, so far as the ground of diverse citizenship is concerned, conforms to the requirement of the bankruptcy act as construed in *Bush v. Elliott, supra*, for the citizenship of the bankrupts is other than that of Louisiana, and the amount in controversy exceeds the sum of \$2,000.00. But it is contended that the petition also discloses a ground of jurisdiction other than diverse citizenship, and upon the solution of that question the present jurisdiction depends.

* * * * *

"Does it, then, appear in the petition in the present case, in addition to averments of diverse citizenship, that the petitioner has asserted a ground of jurisdiction which 'really and substantially involves a dispute or controversy respecting the validity, construction, or effect of a law of the United States, and upon which his right to recover depends?' Such a cause of action was not asserted simply because the action was brought by an assignee in bankruptcy.

* * * * *

"The trustee, for his recovery upon the bond, did not rely upon any right specially conferred upon him under the federal statute which was the subject of controversy, and therefore a ground of jurisdiction. He sued to recover upon the bond solely because of his claim that the 1,311 bales of cotton were at the time of the bankruptcy proceeding the property of Knight, Yancy & Company (the bankrupts). * * *

* * * * *

"It therefore appears that the action as outlined in the petition made the plaintiff's right to recover depend upon the ownership of the property by the bankrupt as its own before the bankruptcy proceeding. The investigation of this question involved only matters of general law, and did not depend upon any right conferred by the bankruptcy act upon the trustee.

* * * * *

"We reach the conclusion that the jurisdiction of

the Circuit Court asserted in the petition in this case rested alone upon diverse citizenship, and therefore, under the Circuit Court of Appeals act, the case is one of those made final in the Circuit Court of Appeals."

While this case was before us, when our original brief was prepared it did not occur to us that counsel would make the contention that ancillary jurisdiction could be tacked to diverse citizenship, and thereby make out a case not "dependent entirely upon the opposite parties to the suit or controversy being * * * citizens of different states."

To the same effect see the case of *Shulthis v. McDougal*, 225 U. S., 561, 56 L. Ed., 1205.

Counsel further say (page 21 of their brief):

"We do not, however, at all concede counsel's contention that only the original bill can be looked to determine whether this appeal lies * * *."

We have merely to suggest in reply to the above that if the case of *St. Louis & K. C. C. R. Co. v. Wabash R. Co., et al.*, 217 U. S., 247, 54 L. Ed., 752, did not satisfy opposing counsel that the *Shulthis* case above cited ought to be sufficient to convince them.

On the same page (21) of their brief, counsel say:

"It (the amended bill) sets up no new matter as having arisen since the filing of the original bill, nor does it contain a single new allegation of fact."

Counsel are again in error. The amended and supplemental bill set up that the *validating* act passed by the Legislature of the State of Mississippi, had been passed *after* the *filing* of the *original bill*. The original bill was filed March 2, 1912 (Rec., p. 9), while the validating act was

passed March 4, 1912 (Rec., p. 131). This was necessarily new matter and was therefore required to be set up as supplemental to the original bill and not merely by way of amendment thereto. This, however, cannot help appellant's case as all the authorities are to the effect that the original petition as first filed must control, and that new matter whether set up by way of amendment, or as supplemental to the original bill, cannot affect the jurisdiction of an appeal upon this point.

We quote from the opinion in the *Shulthis v. McDougal* case, cited above, as follows:

"Whether the jurisdiction depended on diverse citizenship alone, or on other grounds as well, must be determined from the complainant's statement of his own cause of action, as set forth in the bill, regardless of questions that may have been brought into the suit by the answers or in the course of the subsequent proceedings."

Counsel (p. 20, of their brief) assert:

"It has never been held, however, that where, as in the case at bar, an amended bill is filed, setting up no new matters of fact, but correcting an inadvertent failure to present in precise terms a federal question, the original bill alone can be looked to in determining the right of appeal to this court."

In this they are in error. The *Wabash Railroad* case, 217 U. S., 247, referred to in our original brief, and hereinabove, decided this identical point.

We will add that while we do not consider it material that the pleading of the franchise in our amended and supplemental bill was not merely "an inadvertent failure to present in precise terms a Federal question," this franchise

was set out and pleaded in *reply* to the *appellant's answer* found in the Record, page 14, wherein it was contended that in his original bill he had not contended—

“That the effect of its franchise was to prohibit the city from erecting a water works system of its own during the existence of said franchise.”

In reply to this we say the appellee, Henson, set up the franchise in his amended and supplemental bill, and therein contended that even if it had not been decreed in Suit 41 that the appellant was precluded from building water works during the life of the said franchise, that it must now be so decreed in the *preesnt* suit.

Having reviewed appellant's arguments against the Motion to Dismiss the appeal herein, we again submit that this Court is without jurisdiction to hear and determine this cause and that the same must be dismissed.

Respectfully submitted,

EDGAR H. FARRAR,
J. C. BRYSON,
JOSEPH HIRSH.

?

IN THE SUPREME COURT OF THE UNITED STATES

No. 546

No. 1003

Office Supreme
FILED

SEP 23

JAMES H. M

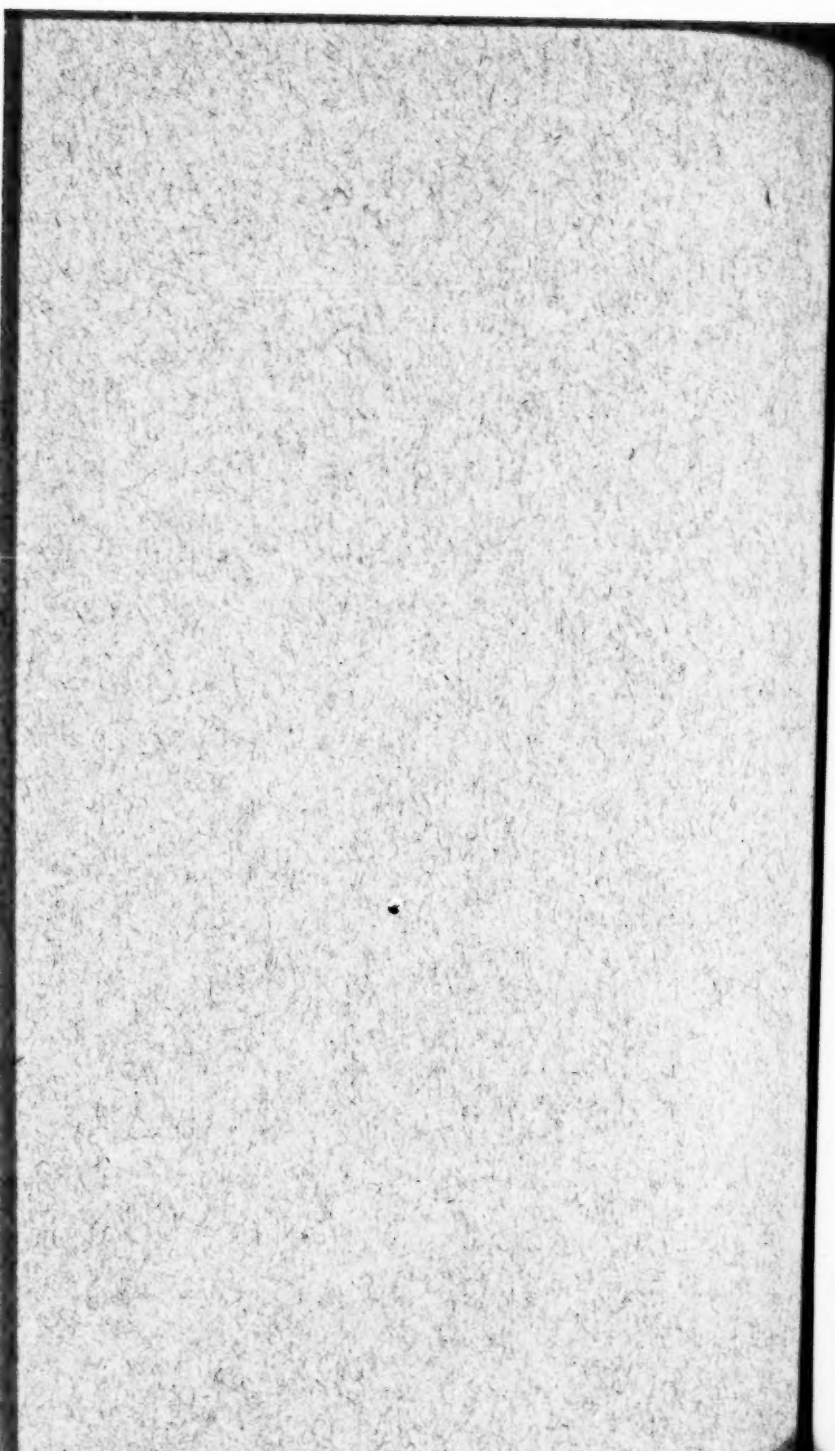
MAYOR AND ALDERMEN OF THE CITY OF VICKSBURG.
Appellant,

VS.

W. A. HENSON, RECEIVER OF THE VICKSBURG WATER
WORKS COMPANY, ET AL.,
Appellees.

BRIEF FOR APPELLANT.

T. C. CATCHINGS,
O. W. CATCHINGS,
GEORGE ANDERSON,
JOHN BRUNINI,
Solicitors for Appellant.



IN THE SUPREME COURT OF THE UNITED STATES

No. 1103.

MAYOR AND ALDERMEN OF THE CITY OF VICKSBURG,
Appellant,

vs.

W. A. HENSON, RECEIVER OF THE VICKSBURG WATER
WORKS COMPANY, ET AL.,
Appellees.

SUBJECT INDEX.

	PAGE
Statement of Facts	1
The franchise does not prohibit the city from erecting waterworks to be operated after its termination.....	9
The right of the city to erect waterworks to be operated after the ex- piration of the franchise was not involved in Cause No. 41 Equity, and was not and could not have been adjudicated therein	24
Appellee is now estopped to assert that the city cannot erect a water- works system to be operated after the termination of the franchise	66
The city should not be enjoined from erecting waterworks to be operated after the expiration of the franchise, for the reason that such a decree would at this time be inequitable.....	69
The bonds were legally authorized.....	71

CASES REFERRED TO.

Am. & Eng. Ency. of Law, 24-777.....	49
Barnes vs. Chicago, etc. R. R., 122 U. S., 1.....	33

	PAGE
Black on Judgments, 2, Sec. 617.....	48
Bigelow on Estoppel, 82	53
Board of Supervisors vs. Wayne Circuit Court, 106 Mich., 166.....	76
Cromwell vs. County of Sac, 94 U. S., 351.....	28
Cromwell vs. County of Sac, 94 U. S., 351.....	31
Crowder vs. Red Mountain Mining Co., 127 Ala., 260.....	32
Crockett vs. Lee, 7 Wheat., 522.....	42
Cye., 16, 225	44
Clark vs. Blair, 14 Fed., 812.....	46
Cys., 23, 1161	49
Cys., 23, 1290	49
Conway vs. Taylor's Executor, 1 Black, 603.....	62
Conway vs. Taylor's Executor, 1 Black, 603.....	65
DeSollar vs. Hanscome, 158 U. S., 216.....	27
Duckworth vs. Duckworth, 35 Ala., 70.....	27
Davis vs. Brown, 94 U. S., 423.....	31
Davis vs. Brown, 94 U. S., 423.....	32
Dillon on Municipal Corporations, Sec. 213.....	73
El Paso Water Co. vs. City of El Paso, 152 U. S., 157.....	17
El Paso Water Co. vs. City of El Paso, 152 U. S., 157.....	62
El Paso Water Co. vs. City of El Paso, 152 U. S., 157.....	65
Ency. Plead. & Prac., 11, 868.....	42
English vs. Foxall, 2 Pet., 595.....	45
Epping vs. City of Columbus, 117 Ga., 296.....	74
Freeman on Judgments, 258.....	27
Freeman on Judgments, 247	28
Freeman on Judgments, 252	28
Freeman on Judgments, 271	33
Foster vs. Goddard, 1 Black, 506.....	42
Freeman on Judgments, 259.....	46
Graham vs. R. R. Co., 3 Wall., 704.....	33
Griffith vs. City of Vicksburg, 58 So., 781.....	72
Harrison vs. Remington Paper Co., 140 Fed., 385.....	26
Hopkins vs. Lee, 6 Wheat., 109	27
Harrison vs. Nixon, 9 Pet., 483.....	41
Harding vs. Handy, 11 Wheat., 103.....	42
Hardin vs. Boyd, 113 U. S., 756.....	45
Hobson vs. McArthur, 16 Pet., 182.....	45
Harriman vs. Northern Securities Co., 197 U. S., 244.....	61
Long vs. City of Duluth, 51 N. W., 913.....	15
Lewis vs. Ocean Navigation & Pier Co., 125 N. Y., 341.....	26
Lockhart vs. Leeds, 195 U. S., 427.....	45
Mayor & Aldermen of the City of Vicksburg vs. Water Works Co., 202 U. S., 453	3

Mayor & Aldermen of the City of Vicksburg vs. Water Works Co., 202 U. S., 453	6
Mayor & Aldermen of the City of Vicksburg vs. Water Works Co., 202 U. S., 453	55
Mayor & Aldermen of the City of Vicksburg vs. Water Works Co., 206 U. S., 496	10
Mayor & Aldermen of the City of Vicksburg vs. Water Works Co., 206 U. S., 496	34
Mayor & Aldermen of the City of Vicksburg vs. Water Works Co., 206 U. S., 496	61
Mayor & Aldermen of the City of Vicksburg vs. W. A. Henson, Re- ceiver of Vicksburg Water Works Co., being the instant case, Transcript 206	25
Mayor & Aldermen of the City of Vicksburg vs. W. A. Henson, Re- ceiver of Vicksburg Water Works Co., being the instant case, Transcript 227	25
Munday vs. Vail, 34 N. J. L., 418	34
Mobile vs. Kimball, 102 U. S. 691	48
Mississippi Laws of 1912, 124	71
Mississippi Laws of 1912	79
Mississippi Laws of 1910	72
Mississippi Laws of 1910	81
Nesbit vs. Independent District of Riverside, 144 U. S. 610	32
N. O. & N. W. R. R. Co. vs. Lincoln Ferry Co., 104 La. Ann., 53	51
Outran vs. Moulwood, 3 East., 346	42
Perkins County vs. Graff, 114 Fed., 441	75
Philadelphia W. & B. R. R. vs. Dubois, 12 Wall., 47	69
Russell vs. Place, 94 U. S., 606	27
Reynolds vs. Stockton, 140 U. S., 254	34
Reynolds vs. Stockton, 140 U. S., 254	42
Richmond R. R. Co. vs. Louisa R. R. Co., 13 How., 71	52
Russell vs. Place, 94 U. S., 606	53
Syracuse Water Works Co. vs. City of Syracuse, 116 N. Y., 167	15
Skaneateles Water Works Co. vs. Village of Skaneateles, 184 U. S., 354	15
Sioux Falls vs. Farmers Loan & Trust Co., 136 Fed., 721	23
Station vs. Rising, 103 Ala., 454	44
Stone vs. United States, 64 Fed., 667	46
Stone vs. United States, 167 U. S., 178	46
State ex rel Wright vs. Savage, 64 Nebraska, 684	50
State ex rel Westenhaver vs. Lambert, 52 W. Va., 248	51
St. Louis, etc., R. R. Co. vs. Wabash R. R. Co., 152 Fed., 849	70
Thomas vs. City of Grand Junction, 56 Pac., 665	15
Thoms vs. Thoms, 45 Miss., 263	44
Taylor vs. Merchants Fire Ins. Co., 9 How., 390	45

	PAGE
Third National Bank of Louisville vs. Stone, 174 U. S., 432.....	50
Truly vs. Wanzer, 5 How., 141	52
Topliff vs. Topliff, 122 U. S., 121.....	68
Vicksburg Water Works Co. vs. Mayor & Aldermen of the City of Vicks- burg, 185 U. S., 65.....	3
Vicksburg Water Works Co. vs. Mayor & Aldermen of the City of Vicks- burg, 185 U. S., 65.....	30
Vicksburg Water Works Co. vs. Mayor & Aldermen of the City of Vicks- burg, 185 U. S., 65.....	34
Vicksburg Water Works Co. vs. Mayor & Aldermen of the City of Vicks- burg, 185 U. S., 65.....	46
Vicksburg Water Works Co. vs. Mayor & Aldermen of the City of Vicks- burg, 185 U. S., 65.....	47
Vicksburg Water Works Co. vs. Mayor & Aldermen of the City of Vicks- burg, 185 U. S., 65.....	48
Vicksburg Water Works Co. vs. Mayor & Aldermen of the City of Vicks- burg, 185 U. S., 65.....	50
Vicksburg Water Works Co. vs. Mayor & Aldermen of the City of Vicks- burg, 185 U. S., 65.....	52
Vicksburg Water Works Co. vs. Mayor & Aldermen of the City of Vicks- burg, 185 U. S., 65.....	53
Vicksburg Water Works Co. vs. Mayor & Aldermen of the City of Vicks- burg, 185 U. S., 65.....	54
Vicksburg Water Works Co. vs. Mayor & Aldermen of the City of Vicks- burg, 185 U. S., 65.....	55
Vicksburg Water Works Co. vs. Mayor & Aldermen of the City of Vicks- burg, 185 U. S., 65.....	66
Vicksburg Water Works Co. vs. Mayor & Aldermen of the City of Vicks- burg, 185 U. S., 65.....	69

(REFERRED TO FREQUENTLY AS CAUSE NO. 41.)

Washington A. & G. Packet Co. vs. Sickles, 24 How., 331.....	28
Wilmington & Weldon R. R. Co. vs. Alsbrook, 146 U. S., 279.....	32
Washington Gas Light Co. vs. District of Columbia, 161 U. S., 316.....	33
Winnipiseogee Lake Co. vs. Young, 40 N. H., 420.....	49
Washington A. & G. Steam Packet Co. vs. Sickles, 5 Wall., 580.....	53
Walla Walla vs. Walla Walla Water Co., 172 U. S. 1.....	56
Walla Walla vs. Walla Walla Water Co., 172 U. S. 1.....	59
Waite vs. Santa Cruz, 184 U. S. 302.....	73

IN THE SUPREME COURT OF THE UNITED STATES

No. 1103.

MAYOR AND ALDERMEN OF THE CITY OF VICKSBURG,
Appellant,

vs.

W. A. HENSON, RECEIVER OF THE VICKSBURG WATER
WORKS COMPANY, ET AL.,
Appellees.

SUBJECT INDEX.

	PAGE
Statement of Facts	1
The franchise does not prohibit the city from erecting waterworks to be operated after its termination	9
The right of the city to erect waterworks to be operated after the ex- piration of the franchise was not involved in Cause No. 41 Equity, and was not and could not have been adjudicated therein	24
Appellee is now estopped to assert that the city cannot erect a water- works system to be operated after the termination of the franchise	66
The city should not be enjoined from erecting waterworks to be operated after the expiration of the franchise, for the reason that such a decree would at this time be inequitable	69
The bonds were legally authorized.....	71

CASES REFERRED TO.

Am. & Eng. Ency. of Law, 24-777.....	49
Barnes vs. Chicago, etc. R. R., 122 U. S., 1	33

	PAGE
Black on Judgments, 2, Sec. 617.....	48
Bigelow on Estoppel, 82	53
Board of Supervisors vs. Wayne Circuit Court, 106 Mich., 166.....	76
Cromwell vs. County of Sac, 94 U. S., 351.....	28
Cromwell vs. County of Sac, 94 U. S., 351.....	31
Crowder vs. Red Mountain Mining Co., 127 Ala., 260.....	32
Crockett vs. Lee, 7 Wheat., 522.....	42
Cye, 16, 225	44
Clark vs. Blair, 14 Fed., 812.....	46
Cys., 23, 1161	49
Cys., 23, 1290	49
Conway vs. Taylor's Executor, 1 Black, 603.....	62
Conway vs. Taylor's Executor, 1 Black, 603.....	65
DeSollar vs. Hanscome, 158 U. S., 216.....	27
Duckworth vs. Duckworth, 35 Ala., 70.....	27
Davis vs. Brown, 94 U. S., 423.....	31
Davis vs. Brown, 94 U. S., 423.....	32
Dillon on Municipal Corporations, Sec. 213.....	73
El Paso Water Co. vs. City of El Paso, 152 U. S., 157.....	17
El Paso Water Co. vs. City of El Paso, 152 U. S., 157.....	62
El Paso Water Co. vs. City of El Paso, 152 U. S., 157.....	65
Ency. Plead. & Prac., 11, 868.....	42
English vs. Foxall, 2 Pet., 595.....	45
Epping vs. City of Columbus, 117 Ga., 296.....	74
Freeman on Judgments, 258.....	27
Freeman on Judgments, 247	28
Freeman on Judgments, 252	28
Freeman on Judgments, 271	33
Foster vs. Goddard, 1 Black, 506.....	42
Freeman on Judgments, 259.....	46
Graham vs. R. R. Co., 3 Wall., 704.....	33
Griffith vs. City of Vicksburg, 58 So., 781.....	72
Harrison vs. Remington Paper Co., 140 Fed., 385.....	26
Hopkins vs. Lee, 6 Wheat., 109	27
Harrison vs. Nixon, 9 Pet., 483.....	41
Harding vs. Handy, 11 Wheat., 103.....	42
Hardin vs. Boyd, 113 U. S., 756.....	45
Hobson vs. McArthur, 16 Pet., 182.....	45
Harriman vs. Northern Securities Co., 197 U. S., 244.....	61
Long vs. City of Duluth, 51 N. W., 913.....	15
Lewis vs. Ocean Navigation & Pier Co., 125 N. Y., 341.....	26
Lockhart vs. Leeds, 195 U. S., 427.....	45
Mayor & Aldermen of the City of Vicksburg vs. Water Works Co., 202 U. S., 453	3

	PAGE
Mayor & Aldermen of the City of Vicksburg vs. Water Works Co., 202 U. S., 453	6
Mayor & Aldermen of the City of Vicksburg vs. Water Works Co., 202 U. S., 453	55
Mayor & Aldermen of the City of Vicksburg vs. Water Works Co., 206 U. S., 496	10
Mayor & Aldermen of the City of Vicksburg vs. Water Works Co., 206 U. S., 496	34
Mayor & Aldermen of the City of Vicksburg vs. Water Works Co., 206 U. S., 496	61
Mayor & Aldermen of the City of Vicksburg vs. W. A. Henson, Re- ceiver of Vicksburg Water Works Co., being the instant case, Transcript 206	25
Mayor & Aldermen of the City of Vicksburg vs. W. A. Henson, Re- ceiver of Vicksburg Water Works Co., being the instant case, Transcript 227	25
Munday vs. Vail, 34 N. J. L., 418	34
Mobile vs. Kimball, 102 U. S. 691	48
Mississippi Laws of 1912, 124	71
Mississippi Laws of 1912	79
Mississippi Laws of 1910	72
Mississippi Laws of 1910	81
Nesbit vs. Independent District of Riverside, 144 U. S. 610	32
N. O. & N. W. R. R. Co. vs. Lincoln Ferry Co., 104 La. Ann., 53	51
Outran vs. Moulwood, 3 East., 346	42
Perkins County vs. Graff, 114 Fed., 441	75
Philadelphia W. & B. R. R. vs. Dubois, 12 Wall., 47	69
Russell vs. Place, 94 U. S., 606	27
Reynolds vs. Stockton, 140 U. S., 254	34
Reynolds vs. Stockton, 140 U. S., 254	42
Richmond R. R. Co. vs. Louisa R. R. Co., 13 How., 71	52
Russell vs. Place, 94 U. S., 606	53
Syracuse Water Works Co. vs. City of Syracuse, 116 N. Y., 167	15
Skaneateles Water Works Co. vs. Village of Skaneateles, 184 U. S., 354	15
Sioux Falls vs. Farmers Loan & Trust Co., 136 Fed., 721	23
Station vs. Rising, 103 Ala., 454	44
Stone vs. United States, 64 Fed., 667	46
Stone vs. United States, 167 U. S., 178	46
State ex rel Wright vs. Savage, 64 Nebraska, 684	50
State ex rel Westenhaver vs. Lambert, 52 W. Va., 248	51
St. Louis, etc., R. R. Co. vs. Wabash R. R. Co., 152 Fed., 849	70
Thomas vs. City of Grand Junction, 56 Pac., 665	15
Thoms vs. Thoms, 45 Miss., 263	44
Taylor vs. Merchants Fire Ins. Co., 9 How., 390	45

	PAGE
Third National Bank of Louisville vs. Stone, 174 U. S., 432.....	50
Truly vs. Wanzer, 5 How., 141	52
Topliff vs. Topliff, 122 U. S., 121.....	68
Vicksburg Water Works Co. vs. Mayor & Aldermen of the City of Vicksburg, 185 U. S., 65.....	3
Vicksburg Water Works Co. vs. Mayor & Aldermen of the City of Vicksburg, 185 U. S., 65.....	30
Vicksburg Water Works Co. vs. Mayor & Aldermen of the City of Vicksburg, 185 U. S., 65.....	34
Vicksburg Water Works Co. vs. Mayor & Aldermen of the City of Vicksburg, 185 U. S., 65.....	46
Vicksburg Water Works Co. vs. Mayor & Aldermen of the City of Vicksburg, 185 U. S., 65.....	47
Vicksburg Water Works Co. vs. Mayor & Aldermen of the City of Vicksburg, 185 U. S., 65.....	48
Vicksburg Water Works Co. vs. Mayor & Aldermen of the City of Vicksburg, 185 U. S., 65.....	50
Vicksburg Water Works Co. vs. Mayor & Aldermen of the City of Vicksburg, 185 U. S., 65.....	52
Vicksburg Water Works Co. vs. Mayor & Aldermen of the City of Vicksburg, 185 U. S., 65.....	53
Vicksburg Water Works Co. vs. Mayor & Aldermen of the City of Vicksburg, 185 U. S., 65.....	54
Vicksburg Water Works Co. vs. Mayor & Aldermen of the City of Vicksburg, 185 U. S., 65.....	55
Vicksburg Water Works Co. vs. Mayor & Aldermen of the City of Vicksburg, 185 U. S., 65.....	66
Vicksburg Water Works Co. vs. Mayor & Aldermen of the City of Vicksburg, 185 U. S., 65.....	69

(REFERRED TO FREQUENTLY AS CAUSE NO. 41.)

Washington A. & G. Packet Co. vs. Sickles, 24 How., 331.....	28
Wilmington & Weldon R. R. Co. vs. Alsbrook, 146 U. S., 279.....	32
Washington Gas Light Co. vs. District of Columbia, 161 U. S., 316.....	33
Winnipiseogee Lake Co. vs. Young, 40 N. H., 420.....	49
Washington A. & G. Steam Packet Co. vs. Sickles, 5 Wall., 580.....	53
Walla Walla vs. Walla Walla Water Co., 172 U. S. 1.....	56
Walla Walla vs. Walla Walla Water Co., 172 U. S. 1.....	59
Waite vs. Santa Cruz, 184 U. S. 302.....	73

IN THE SUPREME COURT OF THE UNITED STATES

No. 1103

MAYOR AND ALDERMEN OF THE CITY OF VICKSBURG,
Appellant,

vs.

W. A. HENSON, RECEIVER OF THE VICKSBURG WATER
WORKS COMPANY, ET AL.,
Appellees.

This is an appeal from a decree of the United States Circuit Court of Appeals for the Fifth Circuit, affirming a decree of the District Court for the Southern District of Mississippi, which enjoined the city of Vicksburg from constructing a municipal waterworks system before the expiration in November, 1916, of the franchise held by the private corporation which now furnishes water to the city and its inhabitants. This case is part of a long-continued and much confused controversy which has existed between the City of Vicksburg and the Vicksburg Water Works Company during the past twelve years, and as the principal question arising on this appeal is one of res adjudicata, it is essential that a brief outline of the litigation be given.

By an ordinance approved November 19, 1886, the City of Vicksburg granted to Samuel R. Bullock and Company, their associates, successors and assigns, the

“exclusive right and privilege for the period of thirty years * * * of erecting, maintaining and operating a system of waterworks in accordance with the terms and provisions of this ordinance, and

of using the streets, alleys, public squares and all other public places within the corporate limits of the City of Vicksburg, Mississippi, as they now exist or may hereafter be extended, and within such other territory as may now or hereafter be in its jurisdiction, for the purpose of laying pipes, mains and other conduits, and erecting hydrants and other apparatus for the conducting and furnishing an adequate supply of good wholesome water to the City of Vicksburg, Mississippi, and to its inhabitants for public and private use."

An option was given the city to purchase the waterworks system to be erected, at an appraised valuation "at the expiration of each period of ten years after this ordinance takes effect." The entire franchise will be found set out in the transcript of record, but the above is all that is material to the decision of this cause. The waterworks system thus provided for was constructed, and finally passed into the ownership of the Vicksburg Water Works Company. On March 9, 1900, the legislature of Mississippi authorized the issuance of \$150,000.00 of bonds with which "to purchase or construct, equip and maintain, a waterworks system." On November 7, 1900, the Mayor and Aldermen of the city of Vicksburg adopted a resolution declaring that the franchise held by the Vicksburg Water Works Company was no longer binding, and refusing to pay the rentals stipulated therein for water furnished, but offering to pay a reasonable price therefor. On the 7th day of December, 1900, the city filed a bill in the Chancery Court of Warren County, Mississippi, alleging that the franchise had been forfeited by reason of various things done and left undone, and praying that a decree be rendered absolving it from any further liability or obligation thereunder.

On February 13, 1901, the Vicksburg Water Works Company filed its bill of complaint in the Circuit Court of the United States for the Southern District of Mississippi, setting up all of the above facts, and alleging that it was the purpose

of the City of Vicksburg to construct a waterworks plant of its own to be immediately operated in competition with its system, that it was unable to compete with a municipal owned plant, and would be financially destroyed if it were forced to do so. The jurisdiction of the Federal Court was invoked on the ground that the act of the Legislature and the various ordinances of the City of Vicksburg adopted in pursuance thereof were laws impairing the obligation of its franchise or contract.

As the principal question presented by this appeal is whether or not the decree in the suit thus begun is conclusive of the case at bar we will, in arguing that question, set out in greater detail the allegations of this bill of complaint and of the supplemental one which was later filed. It is sufficient now to say that the city answered, admitting its purpose to build a waterworks system to be at once operated in competition with that owned by the complainant, and asserting its right to do so, and that finally a decree was rendered in accordance with the prayer of the bill, enjoining the City of Vicksburg from "constructing waterworks of its own until the expiration of the period prescribed in the said ordinance contract and franchise, dated 18th of November, 1886."

Before answering, however, the defendant filed a plea to the jurisdiction of the court, which was sustained by the Circuit Court, which certified the question of its jurisdiction to this Court, which, in the case of *Vicksburg Water Works Company vs. Mayor and Aldermen of the City of Vicksburg*, 185 U. S., 65, reversed the decree of the lower court and held that a federal question was properly presented. Mr. Justice Shiras, in delivering the opinion of the court, expressly stated that nothing was intended to be decided but the question of jurisdiction.

Upon the rendition of the final decree, enjoining the city, as above stated, an appeal was prosecuted to this court, which, in the case of *Mayor and Aldermen of the City of Vicksburg vs. Vicksburg Water Works Company*, 202 U. S., 453, affirmed the decree of the lower court.

The effect of the final decree in this case was of course to put a stop to the issuance of the proposed bonds and to the city's plan to construct and operate a waterworks system in competition with that of the Vicksburg Water Works Company. In the year 1904, however, the city under the authority of appropriate legislation, undertook to regulate both the "meter rates" and the "flat rates" under which water was then being furnished to the people of Vicksburg and adopted ordinances fixing the rates to be charged. On January 1, 1905, the Vicksburg Water Works Company filed its bill of complaint in the Circuit Court of the United States for the Southern District of Mississippi, alleging that these ordinances impaired the obligation of its franchise or contract, and praying that the city be enjoined from enforcing them. It was further alleged that the effect of the decree in the prior case, which was No. 41 on the docket of the Circuit Court, the case we are now discussing being No. 79 thereon, was to preclude the city from regulating the rates of the water company, or, in other words, that the matter was *res adjudicata*. It is unnecessary to recite here the grounds upon which the city claimed the right to regulate water rates, but it is sufficient to say that a final decree was rendered, enjoining it from so doing. An appeal was prosecuted to this court, which, in the case of Mayor and Aldermen of the City of Vicksburg vs. Vicksburg Water Works Company, 206 U. S., 496, affirmed the decree of the lower court.

There have been various other controversies between the city and the water company, which have found their way into the courts, but the cases above referred to are the only ones which have any bearing upon the questions presented on this appeal.

After the final determination of these cases there was much negotiation between the city and the water company, looking to the purchase of the waterworks system, either at a fixed price, or at an appraised valuation, but no agreement was reached, and, as the franchise expires in November, 1916, the city, on the 1st day of January, 1912, declared its purpose and

intention to construct a system of waterworks of its own, *to be operated only after the expiration of the said franchise*, and to that end it called an election to determine whether or not the voters of the city would authorize the issuance of \$400,000.00 of bonds to secure funds with which to do so. The election was held and the bonds were authorized by a vote of 1091 to 167.

On March 2, 1912, W. A. Henson, who had theretofore been appointed Receiver of the Vicksburg Water Works Company, filed a bill of complaint in the District Court for the Southern District of Mississippi, and on May 6, 1912, he filed therein an amended and supplemental bill of complaint, which together form the basis of this action. He set out the purpose of the city to issue bonds to construct a waterworks system to be operated after the expiration of the franchise held by his company, and alleged that under the provisions of the franchise, which we have already quoted, the exclusive privilege during the entire period of thirty years was conferred of "erecting, maintaining and operating" a system of waterworks, and that this right would be violated if the city should erect waterworks in anticipation of the expiration of the franchise, even though they were only to be operated thereafter. In other words, the claim was made that the city could not begin work upon the construction of a plant of its own until after the franchise had expired, because it had by the grant of the franchise, deliberately disabled itself from complying with its duty to furnish water to its inhabitants at its expiration. It was conceded that if the franchise be thus construed, the effect will be to require the city to purchase the existing plant without regard to the desirability of so doing, for the reason that the water works company will be under no duty to furnish water after its expiration, and if the city cannot complete a plant before that time and be in a position to supply water itself it will have to buy the existing plant in order that its inhabitants may have the absolutely essential supply of water.

It was further alleged that the effect of the decree in case No. 41 Equity and of the opinion of this court affirming it, as

reported in 202 U. S., 453, was to adjudicate that the city not only did not have the right to erect waterworks at the time that suit was instituted, to be operated in competition with the existing plant, but that it has not the right now or at any time before the expiration of the franchise to erect waterworks to be operated only after its expiration. The jurisdiction of the court was also invoked on the ground of diverse citizenship, and upon the ground that the ordinances and resolutions adopted by the city were laws impairing the obligation of the franchise contract in violation of Section 10 of Article 1 of the Constitution of the United States. Other allegations were made as to irregularities in the conduct of the bond election and in the steps preliminary thereto, which though not of sufficient importance to be here set out, we will briefly discuss in the argument.

The defendant answered the original and supplemental bills of complaint, denying that the franchise prohibited it from constructing a waterworks system of its own to be operated after its expiration, and that such was the effect of the decree in case No. 41 Equity and of the opinion of this court affirming it. It denied that this question was in any way involved in that litigation, but averred that the sole question presented to the lower court and to this court on appeal was whether or not the city had the right to build a waterworks system for the purpose of competing with the water company.

The answer further set up that the defendant had already within the past three or four years expended large sums of money, aggregating more than \$30,000.00, in laying water mains under streets which it intended to pave, with the intention that the mains so laid should form part of a complete system afterwards to be constructed by it; that this was done with the full knowledge of the water company, which undertook, as a taxpayer, to prevent the city from making these expenditures, solely upon the ground that it was a violation of the provisions of its charter in regard to its indebtedness, and that no protest was ever made or entered upon the ground that to lay these mains was in any way to violate its franchise or the injunction in

cause No. 41 Equity. It averred that by reason of the water company's failure to assert that the city's action in laying these mains was a violation of its rights, it was induced to expend a large sum of money and the water company was estopped now to make such claim.

Many months after the filing of the answer the city advertised for bids for paving certain of its streets and for laying water mains thereunder, whereupon the water company secured a temporary restraining order prohibiting the city from letting contracts to lay water mains, upon the grounds set up in its bills of complaint. This temporary restraining order was made permanent in the final decree.

A large amount of testimony was taken, all of which in our opinion, except that taken by the city to show the conduct and result of the election, and to establish the facts relied upon to support its claim of estoppel, is utterly irrelevant. A motion to suppress was made by the defendant, but was not acted upon by the court. What purports to be an abstract of this testimony was prepared by counsel for the appellee, and was incorporated in the transcript of record by order of the judge of the trial court over the protest and objection of counsel for appellant.

Generally stated, it relates to the long-continued negotiations between the city and the water company, looking to the settlement of their controversies, to the value of the existing plant, and in great detail to the valuation placed on it by an engineer employed by the city and by another engineer employed by the water company and by the water company itself. It also purports to narrate arguments used in the city council of Vicksburg, and to reproduce publications made in the daily newspapers during the progress of the campaign preceding the election to determine the issuance of the \$400,000.00 of bonds in question. It pretends to show the motives that influenced the voters, the arguments made to them, and that trifling sums were expended by the city in making newspaper and

other publications. While we do not all concede that this testimony is true, it is in our opinion so grossly immaterial and irrelevant that we felt it would be an imposition upon the court to disprove it by counter testimony, and it only appears in the transcript of record, as we have said, because it was ordered to be put there over our objection. Under our conception of the equity rules recently promulgated by this court, it should form no part of the transcript, and we disclaim any responsibility for it.

The opinion of the judge of the court of first instance and that of the Circuit Court of Appeals show that their action was based solely upon the plea of *res adjudicata*, and that for this reason alone the city was enjoined from constructing a waterworks system or any part thereof, before the expiration of the franchise of the water works company, and from issuing bonds for that purpose.

ARGUMENT.

We base our contention, that the decrees of the lower courts are erroneous, and should be reversed, upon five grounds.

1st. THE FRANCHISE DOES NOT PROHIBIT THE CITY FROM ERECTING WATERWORKS TO BE OPERATED AFTER ITS TERMINATION.

2nd. THE RIGHT OF THE CITY TO ERECT WATERWORKS TO BE OPERATED AFTER THE EXPIRATION OF THE FRANCHISE WAS NOT INVOLVED IN CAUSE NUMBER 41 EQUITY, AND WAS NOT AND COULD NOT HAVE BEEN ADJUDICATED THEREIN.

3rd. APPELLEE IS NOW ESTOPPED TO ASSERT THAT THE CITY CANNOT ERECT WATERWORKS TO BE

OPERATED AFTER THE TERMINATION OF THE FRANCHISE.

4th. THE CITY SHOULD NOT BE ENJOINED FROM ERECTING WATERWORKS TO BE OPERATED AFTER THE EXPIRATION OF THE FRANCHISE FOR THE REASON THAT SUCH A DECREE WOULD, AT THIS TIME BE INEQUITABLE.

5th. THE BONDS WERE LEGALLY AUTHORIZED.

FIRST.

THE FRANCHISE DOES NOT PROHIBIT THE CITY FROM ERECTING WATERWORKS TO BE OPERATED AFTER ITS TERMINATION.

It is so clear that the *franchise*, when properly construed, does not have the effect of preventing the city from erecting waterworks, to be operated after its expiration, that counsel for appellee, when they drafted their original bill of complaint, did not even so contend. The original bill was based solely upon the idea that the decree in cause No. 41, Equity, prohibited the city from erecting waterworks at any time, and for any purpose during the life of the franchise. After several months' reflection, however, a theory was evolved which is presented in the supplemental bill that the *franchise*, as well as the *decree*, contains such prohibition.

The portion of the franchise which is thus invoked is as follows:

"Section 1. That in consideration of the public benefit to be derived therefrom, the exclusive right and privilege is hereby granted for the period of (30) years from the time this ordinance takes effect unto Samuel

R. Bullock and Company, their associates, successors and assigns, *of erecting, maintaining and operating* a sytem of waterworks, in accordance with the terms and provisions of this ordinance and of using the streets, alleys, public squares, and other public places within the corporate limits of the City of Vicksburg, Mississippi, as they now exist, or may hereafter be extended and within such other territory as may now or hereafter be under its jurisdiction, for the purpose of laying pipes, mains and other conduits and erecting hydrants and other apparatus for the conducting and furnishing an adequate supply of good wholesome water to the City of Vicksburg, Mississippi, and to its inhabitants, for public and private use and for making repairs and extensions to the said system from time to time during the period in which this ordinance is in force."

It is elementary that all public grants are to be construed most liberally in favor of the public; that nothing passes by implication; that all privileges claimed must be expressed in clear and apt language, and that in case of a doubt as to the true meaning, such doubt must be resolved in favor of the public and against the grantee.

These principles have been enunciated so many times by this court that citation of authorities is unnecessary. In the case of Mayor and Aldermen of the City of Vicksburg vs. Vicksburg Water Works Company, 206, U. S., 496, which has been heretofore referred to as cause No. 79 Equity it was said:

"In considering this contract we are to remember the well-established rule in this court which requires grants of franchises and special privileges to be most strongly construed in favor of the public, and that where the privilege claimed its doubtful, nothing is to be taken by mere implication as against public rights. This rule has been applied to a series of contracts in waterworks and lighting cases, and we have no disposition to detract from its force and effect."

The question then is, not what would be the meaning of Section 1 of the franchise, if it formed part of a contract between individuals but what its effect is as a public grant, and in determining this the court must consider whether or not the city of Vicksburg, by clear and apt terms, beyond any reasonable doubt, and without resort to implication, intended to and did preclude itself from constructing waterworks of its own at a time when the franchise should be nearing its expiration, in order to operate them, not in competition with the existing plant, but only after the right to operate that plant had ceased and terminated.

We submit that to state this proposition is to answer it. Indeed, it would seem that the language of the franchise, so far from making clear the city's intention thus to disable itself from performing one of its fundamental duties, shows beyond a doubt that there was no such purpose. There was granted the exclusive right and privilege to "erect, maintain and operate" a system of waterworks for the purpose of furnishing the city and its inhabitants with a good and adequate supply of water. It is manifest that the object of the grant was to secure a supply of water, and that the right to erect was granted merely as antecedent and necessary to the desired result, which could only be reached by the erection, the maintenance and the operation of a waterworks system. In other words, the right to erect, maintain and operate is a single and indivisible thing and is in fact entirely synonymous with the right to supply water.

It is argued by counsel for appellee that the city granted three separate privileges by this franchise, and that they exist independently of each other, viz:

First, the right to erect, second, the right to maintain, and, third, the right to operate.

If this be so, three different franchises were granted instead of one, and the grantees, having a franchise merely to erect waterworks, could have complied with their obligation by erecting without maintaining or operating, and thus, although

the declared purpose of the grant was to secure an adequate supply of water, one of the three separate privileges which counsel for appellee say were conferred, could have been availed of with the effect that the entire purpose of the grant would be defeated.

If Bullock & Company acquired an exclusive right to erect only, no one else could either erect or maintain and operate, because, of course, a waterworks system cannot be maintained and operated without first being erected. We submit that these considerations demonstrate the utter fallacy of counsel's argument. As we have said, the franchise was in effect a grant of the right to supply water, and the phrase, "erect, maintain and operate," was merely adopted as a means of expressing the intention of the parties with the usual legal tautology and in the customary legal cant. It cannot be doubted, we think, that if the grant had simply been of the exclusive right for a period of thirty years to erect waterworks for the purpose of supplying the people with water, the effect would have been precisely the same. Again, it is perfectly clear to us that had the city conferred the exclusive privilege of maintaining and operating waterworks for a period of thirty years for the purpose of supplying water, the same result would have been accomplished.

Under the construction contended for by counsel for appellee, the city placed itself in a most extraordinary attitude, by providing for water for a period of thirty years only and disabling itself from insuring a continuance of the supply after the expiration of that time. Several years, of course, are required to construct a system of waterworks, and unless work can begin before the expiration of the franchise, at the time of its termination the city will have no plant ready to furnish water and no obligation will rest upon the present water works company to do so. The result will be that the city will have to purchase the existing plant without regard to its adequacy or to the desirability of so doing, in order to prevent the calamity which would ensue upon the cessation of the water supply, for its owners have already threatened to discontinue furnishing water upon the expiration of the franchise. And this is pre-

cisely what counsel for appellee contend the city deliberately contrived to bring about. They say that it was purposely provided that the city could not erect waterworks during the lifetime of the franchise so that on its expiration it would have to avail itself of the option to purchase; that although no legal obligation rests upon the city to purchase it conspired against itself to make a purchase in fact unavoidable.

They evidently recognize that any franchise which would result in the city's being deprived of water at its expiration would be void for unreasonableness, and to avoid this difficulty they point out that the city has a right to purchase the existing plant at an appraised valuation at certain stipulated periods, and argue that the existence of this option absolutely controls or changes the meaning of Section 1 of the franchise. They admit that without the option to purchase the city would have the right to erect waterworks before the expiration of the franchise, to be operated only thereafter, but say that because of the option no such right exists. On the other hand, we cannot conceive that a mere option to purchase can have any possible relevancy in determining whether or not the city excluded itself from erecting its own waterworks during the life of the contract. If the purpose had been to compel the city to purchase, the franchise would, of course, have contained such an obligation expressed in clear and apt words. Such provisions were then and are now common in franchises. No reason is suggested why, if the city intended to bind itself to purchase, it should have done so in so clumsy and round-about a way.

The attempt to give to a mere option to purchase the effect of a binding obligation so to do, is very similar to the contention advanced in the very recent case of *Denver vs. New York Trust Company*, decided by this court on May 26, 1913, and not yet officially reported. It was thus stated in the opinion:

"The principal controversy is over the purpose and effect of Sections 11 and 12 of that ordinance. As be-

fore shown, Section 11 states that at the expiration of twenty years the plant 'may be purchased' by the city, if it 'shall then elect so to do,' and Section 12 says that at the expiration of that period, the city 'may, at its election, renew the contract hereby made,' with a reduction of 10 per cent. in the rental for hydrants. The word 'contract' is used here, as elsewhere in the ordinance, as inclusive of the franchise to occupy and use the streets. Each section reserves or gives to the city a pure option. Under one it may purchase the plant, if it so elects, and under the other it may, at its election, renew the contract; but neither imposes any duty or obligation upon it, unless it exercises the privilege therein given. Such is the natural import of the terms employed, and they are plain and unequivocal. But it is said that the presence of the two options imposes on the city the duty of accepting one. Indeed, it is said in support of the bill that a failure to renew is an election to purchase, and in support of the cross bill that a failure to purchase is an election to renew. We are clearly of the opinion that these claims are ill-founded. In the absence of some stipulations to that end the city would be under no obligation to do either. There is no stipulation purporting to impose such an obligation. All that is done is to reserve or give to the city the right to purchase or to renew if it so elects. In other words, it is given a privilege to do either, but with no obligation to exercise it. Its situation is not unlike that of one who has sold real property, with a reserved privilege of repurchasing it or of taking a lease upon it after the expiration of a term of years. Although entitled to avail himself of either phase of the privilege, he is free to reject both."

It will be seen that this court utterly repudiated the suggestion that an option can be twisted or distorted into a binding obligation. While the facts are not precisely the same, the contention made in the *Denver* case and that here made are founded upon the same erroneous conception that in construing

public grants vital obligations and restrictions can be founded upon mere implication and argument.

A similar ruling was made by the Court of Appeals of New York in the case of *Syracuse Water Works Co., vs. City of Syracuse*, 116 N. Y. 167, as follows:

"It is however, urged that the city can avail itself of no means, other than that through the plaintiff, to obtain any water supply, except by resuming and taking its property and powers in the manner prescribed in one of the Section 26 and 29 of the plaintiff's charter, to which reference has already been made. It appears that those provisions were inserted in the charter at the suggestion or request of the common council of the city; and that was evidently done to enable it, in the event referred to in the one, and on the expiration of the time mentioned in the other, section, if the interest of the city should require it, to take the matter of its water supply into its own management and control. It is not seen that this right, reserved to the city, has any essential bearing upon the question of the construction of the grant to the plaintiff. It simply gave the city the opportunity, in the events provided, to become possessed of the property which should constitute the plant of the plaintiff, and be applied to the service of furnishing water to the city. This right was not made a legal duty, upon the performance of which was dependent the power to use means other than through the plaintiff to obtain further means of water supply for the city. It was a privilege, merely, which it might or might not exercise at pleasure."

To the same effect see *Thomas vs. City of Grand Junction*, 56 Pac., 665; *Long vs. City of Duluth*, 51 N. W., 913; *Skaneateles Water Works Co. vs. Village of Skaneateles*, 184 U. S., 354.

If, by reason of the option to purchase the franchise shall be construed as prohibiting the city from erecting waterworks at this time without operating them, then it will, we repeat, have

been given the practical effect of an obligation to buy, for the city cannot exist without water pending the period during which a new plant is being built, if work can only be commenced after the termination of the franchise. It needs no argument to establish the fact that water is so vital a necessity to a city that the discontinuance of its supply for even a few days would bring irretrievable disaster. It is, therefore, indispensable that provision be made for continuing the supply of water upon the termination of the franchise, and it is this which the city proposes to do by building a waterworks plant and holding it in readiness to commence the performance of its functions at that time. On the other hand, the franchise held by the water company is expressly limited to thirty years, and the city acquiesces in the claim that for the full period thereof its holder is entitled to all of the privileges and immunities conferred by it. While, as we have shown, untold damage will result to the city if it is prohibited from building a waterworks system at this time, on the contrary no damage in a legal sense will result to the water company by the establishment of such an enterprise. The city has never obligated itself that it would purchase the waterworks plant. It is not contended that any right would be violated if the city at the expiration of the franchise flatly refused to buy. It is not and cannot be claimed that the water company can continue business at that time. The argument is that the city was prohibited from building so that the water company, at the expiration of the franchise would be in a position to say to it:

"You and your citizens are absolutely dependent upon a supply of water. We are in a position to furnish it and no one else is. We will not do so, and as you cannot do so, water cannot be had unless you will purchase our plant."

We submit that while the construction by the city at this time of a waterworks system would prevent the water company

from thus adopting the methods of the highwayman and demanding the city's money or its life, it would not damage it in a legal sense.

It was seriously contended in the courts below that the city bound itself not to erect waterworks, though with no intention of using them before the expiration of the franchise in exchange for the option given it to purchase the plant to be erected, and yet, if there were no such option the city could take by condemnation. The scheme for purchase at an appraised valuation was inserted quite as much for the benefit of the grantee as for that of the grantor. It is very much more desirable, indeed, to it to be able to sell than to the city to be able to purchase, and it certainly gave up nothing by facilitating the sale of its property.

We almost feel that we should apologize to the court for devoting so much space to a discussion of the city's right to build now by way of preparation for the performance of its duty of keeping its inhabitants supplied with water after the expiration of the outstanding franchise for the reason that this precise question has already been determined by this court under a state of facts almost identical with those of the case at bar. We refer to the case of *El Paso Water Company vs. the City of El Paso*, 152 U.S., 157. The City of El Paso, by an ordinance passed May 7, 1881, undertook to grant "the sole and exclusive right, warrant and authority for a period of fifteen years to manufacture, sell and furnish to the inhabitants of the City of El Paso, to both public and private buildings and for irrigation, within the corporate limits of said city," with "the sole and exclusive right, warrant and authority for said period, to lay pipes, mains and conductors underneath the streets, alleys, lanes and squares in said city, for the purpose of conducting water," and by a subsequent ordinance, rented hydrants at a certain annual rent.

In the years 1889 and 1890 two ordinances were passed and approved by a vote of the people, authorizing the issue of

\$25,000.00 and \$75,000.00, respectively, of the bonds of the city, for the avowed and declared purpose of sinking artesian wells and constructing a system of waterworks to be owned and operated by the city for supplying water to it and its inhabitants for all public and private purposes. The water works company filed a bill seeking to enjoin the city from establishing, maintaining or operating any waterworks within its limits until the expiration of the franchise period of fifteen years, and from selling or negotiating any bonds or other securities for that purpose.

The opinion of the court was delivered by Mr. Justice Brewer, and as we regard it as of controlling importance, and as it is very short, we quote it herewith in full:

"Probably the circuit court sustained the demurrer on the ground that under the constitution of the State of Texas, adopted in 1876, the attempt to grant exclusive rights in these matters was beyond the power of the city, and that, among other matters, is discussed at length by counsel in their respective briefs. That constitution (Art. 1, Paragraph 26) provides that 'perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed.' In the case of *Brenham vs. Brenham Water Co.*, 67 Tex. 542, the Supreme Court of the State construing this provision, held that a contract similar to that made with the plaintiff was inhibited by the constitution, and that neither the City Council nor the State Legislature had power to make or authorize such a contract.

"We do not deem it necessary to consider the important constitutional question thus presented, for it does not appear from the record that there is over \$5,000 in controversy, as is necessary to give this court jurisdiction. The bill is filed by the plaintiff to protect its individual interests, and to prevent damage to itself. It must, therefore, affirmatively appear that the acts charged against the city and sought to be enjoined, would result in its damage to an amount

in excess of \$5,000. So far as respects the matter of taxes, which by the issue of bonds, would be cast upon the property of the plaintiff, it is enough to say that the amount thereof is not stated, nor any facts given from which it can be fairly inferred.

"With regard to the claim of exclusive rights there is no allegation in the bills of the time at which the city will, unless restrained, commence the operation of its contemplated system of waterworks, and thus interfere with the actual performance of its contract with the plaintiff so far as respects the supply of water. Every averment would be satisfied by proof that the city intended to begin the use of its proposed waterworks on the day before the expiration of the fifteen years. And the only distinct disclosure of damage in the bills, or by the affidavits filed in this court is that resulting from an actual supply of water by the city and a failure to pay the plaintiff for the use of its hydrants. So far as the mere construction of waterworks is concerned, that of itself is no violation of the terms of this contract. The time for which the exclusive right, as claimed was given, was fifteen years, and the city would be guilty of no breach of any obligations if, during the life of the contract, it proceeded to sink artesian wells, to establish waterworks and put itself in condition to, in the future and after the termination of the fifteen years, supply water for all public and private purposes. Suppose that the very next day after the acceptance by the grantee of these franchises the city had commenced the work of sinking artesian wells and establishing a system of waterworks and had continued its labors in that direction during the entire life of the contract, that would have been no breach of its obligation to the plaintiff. It might have affected pecuniarily the value of the plaintiff's plant in that it carried a strong intimation that the moment the fifteen years expired the city would itself engage in the work of supplying water, and thus take from the plaintiff its business. So, preparations made by the city at the time stated in the bills, to-wit: 1889 and 1890 for the establishment of

waterworks may and doubtless did, have some effect upon the value of the plaintiff's property, but the extent of the diminution of value thus caused is not alleged, and cannot be inferred. The bills do not allege that the city in terms denies the validity of its agreements to pay rent for hydrants or otherwise, and the acts which they charge that the city is about to do are acts which the city may do consistently with the continuance of the contract, and as a mere matter of preparation for the discharge of a public duty after the termination of that contract. Under the circumstances, we are of the opinion that it is not affirmatively disclosed by the record that the amount in controversy is a sum in excess of \$5,000 and therefore, for want of jurisdiction in this court, the appeal must be dismissed."

It is urgently contended on behalf of appellee that the decision that the building of a waterworks system before the expiration of the franchise, to be operated thereafter, was not a violation of the contract was obiter dictum for the reason that the only question presented was one of jurisdiction. One of the counsel for appellee in his brief in the court below even went so far as to characterize it as "the mere talk" of the judge who was the mouthpiece of the court, although it constitutes almost the entire opinion.

It is, of course, true that the case went off upon a question of jurisdiction of the appeal, but in order to determine this it was necessary for the court to decide just what it did. At that time, to maintain an appeal from a lower federal court, it was ordinarily necessary that over \$5,000.00 be involved and that this fact affirmatively appear from the record. The court, therefore, examined into the case as made by the record and determined the law insofar as was necessary to decide whether the jurisdictional amount was in fact involved. It held that it was without jurisdiction as no contract right was shown by the allegations of the bill to have been violated, and as no money damage appeared to have been done, and pointed out

that it was not even alleged that more than \$5,000.00 was involved.

It will, therefore, be seen that the question presented in this case was precisely that involved in the matter now under discussion. Counsel for appellee in the courts below made desperate efforts to escape the force of this case and to distinguish it from the case at bar by quibbling over the exact phraseology of the two franchises. It was argued, for instance, that because the word "erect" was not used in the El Paso franchise, the case is not in point. The statement of facts discloses that the "sole and exclusive right, warrant and authority for the period of fifteen years to manufacture, sell and furnish water to the inhabitants of the City of El Paso to both public and private buildings, and for irrigation within the corporate limits of said city" was granted "with the sole and exclusive right, warrant and authority for said period to lay pipes, mains, and conductors underneath the streets, alleys, lanes and squares of said city for the purpose of conducting water." There was thus in terms an absolute grant, both of the exclusive right to furnish water and to lay mains. The laying of mains is in itself a necessary and most important part of the construction or "erection" of a waterworks system. Water cannot be furnished without mains, and if an exclusive right to "erect" mains is given the practical effect is the same as if the exclusive right were given to "erect" the entire system.

Aside from this, in the case at bar the city has been specifically enjoined from laying mains under its streets upon the theory that the effect of the franchise was to prohibit it from laying mains until its expiration. In this particular the two franchises are not only substantially but actually the same. The question presented in both cases is whether a city having granted an exclusive franchise has the right before its expiration to erect a system of waterworks or any part thereof, whether it be the laying of mains or setting up of machinery, and in the El Paso case the court, in holding that

such power exists, provided there be no attempt to operate the system until the termination of the franchise, placed the decision on the ground that "the acts which they charge that the city is about to do are acts which the city may do consistently with the continuance of the contract and as a mere matter of preparation for the discharge of a public duty after the termination of that contract."

As we have said before, we regard this case as absolutely settling the meaning of the Vicksburg franchise. Of course, counsel contend that because the El Paso franchise did not contain an option on behalf of the city to purchase the waterworks plant at its expiration, the situation was different. We simply cannot conceive that this court could have been influenced in its decision by the existence or non-existence of such an option. The question presented was whether or not the city was precluded from erecting waterworks, and this is entirely apart from any right which it might have to purchase. The two things are wholly independent one of the other, and the determination of the effect of the city's grant cannot be made to depend upon its right to purchase.

If, in fact, the right of the City of El Paso to build waterworks depended, as counsel say, on the lack of a power to purchase, it is singular indeed that no allusion was made to it in the opinion. The argument of counsel proceeds upon the assumption that the city was permitted to build only to prevent a failure of its water supply inasmuch as it did not have a contract right to buy. The decision, however, was founded wholly upon the holding that the city by building and not operating would violate no right of the water company and no obligation of its franchise.

It was expressly said: "Suppose that the very next day after the acceptance by the grantee of these franchises the city had commenced the work of sinking artesian wells and establishing a system of waterworks, and had continued its labors in that direction during the entire life of the contract, that

would have been no breach of its obligation to plaintiff." And again the court said: "So far as the mere construction of water-works is concerned, that, of itself, is no violation of the terms of this contract."

This language is wholly inconsistent with the idea that if there had been an option to purchase there would have been an obligation not to build. The question of what was granted could never have been determined by the utterly irrelevant consideration of whether there existed a mere option to buy.

Again counsel find comfort in the provision of the Texas Constitution prohibiting monopolies and perpetuities, which they say rendered void the exclusive feature of the El Paso franchise, and they argue that for this reason the El Paso case is not in point. And yet this court, at the beginning of its opinion, was careful to say in reference to the argument based on this clause: "We do not deem it necessary to consider the important constitutional question thus presented."

The anomalous condition is thus presented of counsel's insisting that the court was absolutely controlled by a matter the mere consideration of which it expressly disclaimed.

While we consider the El Paso case as absolutely conclusive, we also call attention to that of *Sioux Falls vs. Farmers' Loan & Trust Co.*, 136 Fed. 721. The City of Sioux Falls, South Dakota, had, like the City of Vicksburg, granted an exclusive franchise for the erection and operation of a waterworks system, and, like the City of Vicksburg, some four years before its expiration, undertook to build one of its own. A bill was filed to enjoin it from issuing the necessary bonds on various grounds, and the court in a very few words, disposed of the contention that in undertaking to build before the expiration of the franchise, it violated its letter or spirit by saying:

"Recognizing this rule the city treated the contract as a binding contract upon it for twenty years. In its answers, both to the bill and cross bill, it is alleged that the city had no intention of operating the system of

waterworks which it proposed to build until after the expiration of the contract between the city and Kuhn; and for the full term of twenty years both the city and the water company have performed their several obligations under the contract."

Counsel for appellee seek to distinguish this case on the ground that the franchise had expired shortly before the Circuit Court of Appeals delivered its opinion. No allusion whatever was made to this fact in the opinion and it is doubtful if the court even observed it. Counsel acquired their information only by comparing the date of the expiration of the franchise with that of the delivery of the opinion. Of course, the validity of the bonds was to be determined by the city's right to issue them when it sought to do so and it was enjoined several years before the franchise expired. The mere fact that this event occurred before the case was finally disposed of in the appellate court was not of the slightest importance and was not even alluded to by the court.

We submit that the rights and obligations of El Paso, Sioux Falls and Vicksburg, so far as concerned the building of waterworks, were identical and that what was deemed so free from doubt in the prior cases is equally clear in the one at bar.

We are unable to believe that the City of Vicksburg will be prohibited from "a mere preparation for the discharge of a public duty after the termination" of its contract, notwithstanding the fantastic theory which counsel have evolved in the effort to import such a prohibition into the franchise.

SECOND.

THE RIGHT OF THE CITY TO ERECT WATERWORKS TO BE OPERATED AFTER THE EXPIRATION OF THE FRANCHISE WAS NOT INVOLVED IN CAUSE NO. 41 EQUITY, AND WAS NOT AND COULD NOT HAVE BEEN ADJUDICATED THEREIN.

The opinion of the District Court, which will be found on page 206 of the transcript, shows that the injunction was granted upon the sole ground that the city is estopped by the decree in Cause No. 41 Equity to assert now its right to build waterworks, even though they are not intended to be operated until after the expiration of the franchise. The court said:

"Believing as we do that the real question here presented has been decided in express terms by this court and affirmed by the Supreme Court of the United States in 202 U. S. 458-472, and is *res adjudicata*, it is not necessary to consider any other question presented by learned counsel."

The Circuit Court of Appeals affirmed the decree of the District Court on the same ground. Its opinion appears on page 227 of the transcript, and is in full as follows:

"The motion to dismiss this appeal is overruled. On the merits, a majority of the judges being of opinion that the decree of the Circuit Court in Cause No. 41 on the docket, affirmed by the Supreme Court in *Vicksburg vs. Vicksburg Water Works*, 202 U. S., 453, constitutes an estoppel against the City of Vicksburg in the present suit, the decree appealed from should be and it is affirmed."

It is thus manifest that although two courts have held that the City of Vicksburg has no right to build waterworks at this time when the franchise is nearing its end, in anticipation of that event and by way of preparation to perform the duty which will then devolve upon it of furnishing water to its citizens, it has not been held that this disability arises from anything contained in the franchise which is the contract entered

into by the parties to this cause. It is held that such disability exists only because in a prior litigation a decree was rendered enjoining the city from building waterworks. We have, we think, already demonstrated that the franchise, when properly construed according to its plain terms, and particularly in view of the *El Paso* case, *supra*, could not be given this effect, and as the decree in the former cause was founded upon the franchise, undertook to interpret and apply it, and was not and could not have been rendered with the purpose and intent of changing the obligations and restrictions of the parties thereto, a singular condition will have arisen if the contract permits the city to do what it now proposes to do and yet the decree of a court of equity founded thereon forbids it to do so. We submit, therefore, at the outset of our discussion of this branch of the case, that so extraordinary a result should not be countenanced if it can be legitimately avoided. Appellees' victory in the two lower courts has not been founded upon the protection of any contract right, and if this court, in construing the franchise, shall hold that the decree confers rights and imposes limitations broader than the contract on which it was founded, a miscarriage of justice will certainly have occurred. The rules of judicial procedure, and the doctrine of *res adjudicata* were not intended to lead to such results. On the contrary the greatest caution and strictness are observed in dealing with the matter of estoppel by judgment or decree to avoid the doing of injustice.

Thus it has been expressly decided that the burden of proof is on the party asserting an estoppel by judgment.

Harrison vs. Remington Paper Co., 140 Fed., 385.

Lewis vs. Ocean Navigation & Pier Co., 125 N. Y., 341.

Again, it has many times been held that upon an issue of *res adjudicata* all doubts must be resolved against the party pleading it.

"Now, it is of the essence of estoppel by judgment that it is certain that the principal fact was determined by the former judgment."

DeSollar vs. Hanscome, 158 U. S., 216.

"According to Coke, an estoppel must be 'certain to every intent' and if upon the face of the record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded and nothing conclusive in it when offered in evidence."

Russell vs. Place, 94 U. S. 606.

"Matters essential to complainant's right to relief must appear not by inference, but by direct and unambiguous averment."

Duckworth vs. Duckworth, 35 Ala., 70.

"No judgment or decree is evidence in relation to any matter which came collaterally in question, nor to any matter incidentally cognizable, or to be inferred from the judgment only by argument or construction. An estoppel cannot be created by mere argument."

Freeman on Judgments, Sec. 258.

"The rule as to the conclusiveness of a judgment or decree of a court of competent jurisdiction, does not apply to points which come only collaterally under consideration, or are only incidentally considered, or can only be argumentatively inferred from the decree."

Hopkins vs. Lee, 6 Wheat, 109.

It is by reason of the jealous strictness with which the rights of litigants are guarded against any possibility of injury or wrong by misapplication of the doctrine of res adjudicata, that it has been said to have ceased to be odious, and

that on the contrary, "it is more than freed from approbrious appellations. The vocabulary of the judges has been well-nigh exhausted to supply it with honorable and endearing titles."

Freeman on Judgments, 247.

Certainly, a doctrine so highly praised was never intended to broaden and enlarge contract rights, to restrict a governmental agency in the performance of its duty, to bar defenses never asserted under circumstances which would have made their interposition impossible, or to establish conclusively matters which the very litigants themselves never knew were in issue. And yet we submit that this is precisely the effect of the decree appealed from.

This court has held, and it is elementary law, that "the essential conditions upon which the exception of *res adjudicata* becomes applicable are the identity of the thing demanded, the identity of the cause of the demand and of the parties in the character in which they are litigants."

Washington A. & G. Packet Co. vs. Sickles, 24 How., 333.

See also Freeman on Judgments, 252.

It is conceded that the requisite identity as to parties exists, and it is only necessary, therefore, to inquire whether or not the real matter in litigation in Cause No. 41 Equity was the same as that here involved. To solve this question it is first necessary to inquire whether or not the cause of action in both cases was the same, for if this be so all matters are concluded which were or might have been litigated, while otherwise only those defenses are barred which were actually asserted in the prior cause. This doctrine was enunciated with great force and elaboration in *Cromwell vs. County of Sac*, 94 U. S., 351 which is the leading case on the law of estoppel by judgment. Indeed, it has been cited with approval and followed by the appellate tribunals of most, if not all of these states. It was an action on four bonds of the County of Sac in the State of Iowa, each for

\$1,000.00 and four coupons for interest attached to them, each for \$100.00. To defeat the action the defendant relied upon the estoppel of a judgment rendered in favor of the county in a prior cause brought by one Samuel C. Smith upon certain earlier maturing coupons on the same bonds, accompanied with proof that the plaintiff, Cromwell, was at the time the owner of the coupons in that action, and that was prosecuted for his sole use and benefit. This court held that the two causes of action were different, and that there was, therefore, no estoppel, saying:

"In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but

also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action, the inquiry must always be as to the point or question actually litigated, and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

Cause No. 41 Equity, the decree in which is relied upon as conclusive of the case at bar, was instituted February 13, 1901 for the purpose of enjoining the City of Vicksburg from building waterworks under an act of the Legislature of Mississippi enacted in the year 1900, which authorized the issuance of \$150,000.00 of bonds to secure funds for that purpose. At that time the franchise had more than fifteen years to run, and as we will show later by a detailed reference to the pleadings, the purpose entertained by the city was to build waterworks to be immediately operated in competition with those of the complainant and the validity of the franchise was denied by the city and its right to compete asserted. At that time there was pending in the Chancery Court of Warren County, Mississippi, a bill filed by the city asking that the franchise be declared forfeited for various reasons not necessary to relate here, and in its answer in Cause No. 41 Equity the city denied that by the terms of the franchise it had ever excluded itself from competing with the existing company or from granting a franchise to other persons.

In the case at bar the suit was instituted March 2, 1912, something over four years before the expiration of the franchise, to enjoin the city from effectuating its declared purpose to build waterworks to be operated, not in competition with the complainant, but after the expiration of its rights under the franchise. The city was proceeding under the authority of an amendment to its charter adopted in the year 1905, and had held an election at which the issuance of \$400,000.00 of bonds was authorized. It thus appears that the two controversies involved the exercise of corporate powers conferred by entirely distinct legislation; that in the first controversy the city denied the validity of the franchise and asserted its right to compete with the existing company, and that in the second suit the city admits the validity of the franchise and denies its purpose to compete. There can be no doubt, therefore, we submit, that the causes of action were different and it follows that the city is not precluded from interposing any defense to the action to enjoin it from building waterworks as now contemplated which was not actually made and adjudicated in the prior cause. The inquiry, therefore, is as to what was actually litigated and decided.

This court has in a number of decisions reaffirmed the doctrine of *Cromwell vs. County of Sac*, *supra.*, and decided what constitutes different causes of action within its meaning.

The case of *Davis vs. Brown*, 94 U. S., 423, was an action against the defendants as second endorsers upon ten promissory notes of one McOmber, made at Saratoga Springs in the State of New York, in June, 1870, each for \$500.00 and payable to his order in from thirty-two to forty-one months after date. The defense set up to defeat the action was that the notes in suit were transferred in June, 1871, with other notes of the same party of like amount and date, to the Ocean National Bank by the defendants, in part satisfaction of a note of their own then past due, the balance being paid in cash, and were endorsed by the defendants as a mere matter of form, upon an

agreement in writing of the bank that they should not be held liable on their endorsements, or be sued thereon.

It was urged that this defense was barred for the reason that in a former case judgment was rendered against the defendants as second endorsers upon two notes which were part of the series of notes of McOmber's transferred to the bank by defendants in settlement of their own note and their endorsement was embraced in this agreement. In that case the defendants relied solely upon other grounds and did not plead the agreement of the bank not to hold them liable as endorsers.

The court held that notwithstanding the prior judgment they were at liberty to assert this defense, for the reason that the causes of action were different and the question thus presented was not actually litigated in that proceeding.

To the same effect see *Nesbit vs. Independent District of Riverside*, 144 U. S., 610, and *Wilmington & Weldon R. Co. vs. Alsbrook*, 146 U. S., 279. Also see *Crowder vs. Red Mountain Mining Co.* 127 Ala., 260, in which it was held that a judgment for the defendant in an action to recover an annual installment on a promissory note did not bar a subsequent action to recover the principal of the note. In all of these cases the causes of action in the respective suits were much more closely related than in the case at bar and yet it was held that they were different.

It is always admissible to consult the record of the prior case to determine what was decided, and the language of the judgment or decree relied upon as an estoppel must be interpreted with relation to and limited by the issues presented.

"When a judgment is offered in evidence in a subsequent action between the same parties on a different demand it operates as an estoppel only upon the matter actually at issue and determined in the original action, and such matter when not disclosed by the pleadings must be proved by extrinsic evidence."

Davis vs. Brown, 94 U. S., 423.

"The elementary rule is that for the purpose of ascertaining the subject matter of a controversy and fixing the scope of the thing adjudged, the entire record, including the testimony offered in the suit, may be examined."

Washington Gas Light Co. vs. District of Columbia, 161 U. S., 316.

"It is our duty to construe the decree with reference to the issue it was meant to decide. Its words are very broad and very emphatic, but we cannot say that they were intended by the district court to have any greater effect than to avoid and set aside as against Cleveland the agreement and the judgment impeached by his bill. We think on the contrary that a decree having such an effect could not have been properly rendered upon the pleadings and issue in that case."

Graham vs. R. R. Co., 3 Wall., 704.

"Every decree in a suit in equity must be considered in connection with the pleadings, and if its language is broader than is required it will be limited by construction so that its effect would be such and such only as is needed for the purposes of the case that has been made and the issues that have been decided."

Barnes vs. Chicago, etc., R. R., 122 U. S., 1.

"The rule that no judgment is conclusive of anything not required to support it is not a mere rule of construction * * * * but is an unyielding restriction of the powers of the parties, of the court and of the jury."

Freeman on Judgments, Sec. 271.

As the contention that the city is estopped is based almost entirely upon the exact language of the decree in Cause No.

41 Equity, the elementary principle announced in the above cases is of controlling importance. The portion of the decree relied upon is as follows:

"Fifth. That the said defendant refrain from constructing waterworks of its own until the expiration of the period prescribed in the said ordinance contract and franchise dated 18th of November, 1886."

It is insisted that the meaning of this language is so clear that there is no room for construction; that it must be given its full and literal signification; that because the decree enjoined the city from "constructing waterworks of its own until the expiration of the period prescribed," the city is wholly without power to build waterworks for any purpose whatsoever; that it cannot even lay disconnected mains in its streets in order that they may be paved without the necessity of tearing up and injuring the pavements to lay mains when the new plant is constructed.

The authorities cited show, we think, that this directly conflicts with elementary principles of law. Aside from this, this court in its opinion in Cause No. 79 Equity, which is reported in 206 U. S., 496, expressly held that the decree in Cause No. 41 Equity, now under discussion, "must be read in the light of the issues involved in the pleadings and relief sought."

As has been well-said, the rule that a decree cannot go beyond the issues involved is not merely one of construction, but is a limitation upon the power of the court. A most instructive case upon this point is that of *Reynolds vs. Stockton*, 140 U. S., 254. This court among other cases, cited *Munday vs. Vail*, 34 N. J. L., 418, and made the following quotation from the opinion therein, which it in express terms adopted as a correct statement of the law:

"That a court cannot go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment. It is impossible to concede that because A and B are parties to a suit, a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons by becoming suitors do not place themselves for all purposes under the control of the court, and it is only over these particular interests which they choose to draw in question that a power of judicial decision arises."

"And again, 'A judgment upon a matter outside of the issue must, of necessity, be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard. And it is upon this very ground that the parties have been heard, or have had the opportunity of a hearing, that the law gives so conclusive an effect to matters adjudicated. And this is the principal reason why judgments become estoppels. But records of judgments are not estoppels with reference to every matter contained in them. They have such efficacy only with respect to the substance of the controversy and its essential concomitants.' Thus Lord Coke, treating of this doctrine, says: 'A matter alleged that is neither traversable nor material shall not estop.' Co. Litt. 352b. And in a note to the *Duchess of Kingston's* case, in 2 *Smith's Lead. Cas.* 535, Baron Comyn is vouched for the proposition that judgment's 'are conclusive as to nothing which might not have been in question or were not material.'

"For the same doctrine, that in order to make a decision conclusive not only the proper parties must be present, but that the court must act upon the 'property according to the rights that appear' upon the record. I refer to the authority of Lord Redesdale. *Gifford vs. Hort*, 1 Sch. & Lef. 408. See also *Gore vs. Stacpoole*, 1

Dow, P. C. 30; Colclough vs. Sterum, 3 Bligh, 186.' Reference is made in the opinion to the case of Corwith vs. Griffing, 21 Barb. 9, in respect to which the court said: 'Commissioners in partition, in their distribution, embraced land other than that contained in the petition, and the court confirmed their report, and it was held that such judgment was a nullity, as the jurisdiction was confined to the subject matter set forth and described in the petition. In this case the court had jurisdiction in cases of partition and the decision was upon the ground that the decree was void as it was aside from the issue which the proceeding presented.'

This ruling is, we submit, founded not alone upon common sense but upon fundamental principles of justice. It is intolerable that one's rights may be determined without notice that they are assailed. Courts of justice are confronted with the most difficult of tasks in performing the duty devolved upon them of deciding controversies which have actually arisen and are pending between suitors who appear before them, and should they undertake to adjudicate matters not necessarily in issue they would indeed add to their burden as well as inflict great wrong upon the litigants. In our reading of the cases bearing upon the law of estoppel by judgment or *res adjudicata*, we have been struck with the fact that the least important of all of the tests prescribed is the actual language of the judgment or decree. The inquiry is always as to the matters in litigation, and we have found no case where the exact phraseology of the decree is held to be the true guide.

We have already pointed out the difference in the situation and purpose of the city and of the water company at the time of the institution of Cause No. 41 Equity and that of the case at bar, and that the controversies involved were wholly dissimilar. We will now discuss in detail the allegations of the pleadings to bear out our contention that the city's right to

build waterworks to be operated after the termination of the franchise was not in issue.

The original bill of complaint, which will be found on page 106 of the transcript, contained the following allegation of fact as to the city's intention to build waterworks at that time; the act referred to being that which authorized the issuance of bonds.

"Said act is contained in Acts of 1900, page 80 reference to which is hereby made, whereby said Legislature assumed to annul and abrogate the aforesaid ordinance and contract said city entered into with said Bullock and Company and their assigns, in this, that by reason of said ordinance and contract said city has no right within the period of 30 years *to engage in the business of supplying water to the inhabitants of said city in competition with said Bullock and Company or their assigns, notwithstanding which said act authorizes and permits said city to construct, and maintain waterworks for said purpose, if unable to buy the waterworks at the arbitrary and inadequate price fixed by said legislative act,*" etc.

That part of the prayer of the original bill which relates to the claim that by building and operating waterworks of its own the city would violate the franchise, is as follows:

"Wherefore, for as much as your orator can have no adequate relief at law but only in a court of equity, where matters of this sort are cognizable and relievable, and to the end that defendant may be required to answer (answer under oath being hereby expressly waived) each and all of the allegations hereinbefore stated, and may be required to desist the further infringement and invasion of your orator's lawful rights and may be decreed from *constructing or acquiring and operating a system of waterworks in competition with your orator's waterworks*, and to that end that

your orator may have such other and further relief as unto your honors may seem proper wherefore your orator prays."

A supplemental bill was also filed which appears on page 24 of the transcript. It's only allegations which bear on the city's right to build waterworks are as follows:

"First. Your orator would respectfully state that since the passage and approval of the act of the legislature entitled, 'An act authorizing the Mayor and Aldermen of the City of Vicksburg to issue bonds to the amount of three hundred and seventy-five thousand (\$375,000.00) dollars, to purchase or construct, equip and maintain a waterworks system, construct and establish a sewerage system, to purchase grounds for, erect and equip a city hall construct the necessary building for the hospital medical college, and for other purposes.' Said act is to be found on page 180 et seq., of the sheet acts of the said State and in accordance with its terms and provisions a pretended election was held on the 3rd day of July, 1900, under the authority of—a pretended resolution passed by the defendant on the question of bonding the city for said amounts and purposes was pretended to be submitted to the registered and qualified of—said city under its act, which propositions were carried by a small majority of the voters, which question was in words and figures as follows to-wit: 'Be it resolved by virtue of the authority vested in the Mayor and Aldermen of the City of Vicksburg, by the act of the Legislature of Mississippi, entitled an act to authorize the Mayor and Aldermen of the City of Vicksburg to issue bonds to the amount of three hundred and seventy-five thousand (\$375,000.00) dollars to purchase or construct, equip and maintain a waterworks system, construct and establish a sewerage system to purchase grounds for, erect and equip a city hall, construct the necessary building for the hospital medical college and for other purposes. Approved March 9th, 1900.

"An election shall be held on the third day of July on which day the question shall be submitted to the registered and qualified voters of said city whether the bonds of said city to the amounts of three hundred and fifty thousand (\$350,000.00) dollars, to purchase or construct, equip and maintain a waterworks system, construct and establish a sewerage system to purchase grounds for, erect and equip a city hall; shall be sold and issued for the above named purposes."

"Third. Your orator would further show as before stated in the original bill of complaint in this cause, the defendant caused its charter to be amended by the legislature of the State of Mississippi in 1886 to provide for the erection and maintenance of a waterworks system to supply the city with water or to contract with party or parties who should build and operate waterworks and the city having elected to enter into a contract with S. R. Bullock and Company and assigns on the day of November, 1886, to provide the defendant, the city and inhabitants thereof with water for public and domestic purposes for thirty (30) years, at a stipulated price as agreed upon in said ordinance. Therefore said city by its contract and ordinance with S. R. Bullock & Company and assigns are precluded from issuing and selling bonds to build, construct, maintain and operate a waterworks of its own, as provided by said legislative act and said resolution and said election of 1900; *in competition with your orator against its own contract.*"

The prayer of the supplemental bill, among other things, contained the following, which is all that is relevant to the matter under discussion:

"The premises considered, your orator prays that this honorable court will enjoin the defendant from issuing and selling said bonds for the purpose of build-

ing and constructing waterworks of its own *in competition with your orator* and in addition thereto that this honorable court will decree said act, resolution and election to be invalid and unconstitutional and that the defendant be precluded and restrained and enjoined from constructing waterworks of its own in said city, until the expiration of your orator's contract. And that the defendant be required to answer this amended bill without making any oath thereto and that your orator be entitled to and have the benefit of all general and special relief as may be just and right."

There is nothing whatever in the city's answer which can be or is claimed to have broadened in any way the issue presented by the above allegations as to the building of waterworks. The quotations we have made show that the pleader, so far from averring the intention to build waterworks to be operated after the expiration of the franchise and not in competition with its holder, both in the original and supplemental bills, was careful to charge in precise terms that the purpose was to compete. Thus, the original bill charged that the city had no right within the period of thirty years to engage in the business of supplying water to its inhabitants and that in violation of the franchise, its intention was to construct and maintain waterworks for that purpose. The allegation of the supplemental bill as to the building of waterworks closes with a succinct statement of the rights claimed to be invaded and of the act proposed to be done, as follows:

"Therefore, said city by its contract and ordinance with Samuel R. Bullock & Co. and assigns, are precluded from issuing and selling bonds to build, construct, maintain and operate a waterworks of its own as provided by said legislative act and said resolution and said election of 1900 *in competition with your orator against its own contract*."

In neither the original nor supplemental bill is there the remotest suggestion that the city has no right to build waterworks during the life of the contract under any and all circumstances. There is not an allegation that by doing so it would infringe upon the rights of the complainant or injure it in any way whatsoever. The only grievance stated is that the city proposed to compete with and thus destroy the business of complainant. Indeed, the allegations of intended competition utterly exclude the possibility that the pleader had in mind a purpose on the part of the city to build waterworks and not compete with the existing plant for two such inconsistent plans could not be entertained at the same time.

We have cited numerous cases holding that a judgment or decree can be no broader than the issues upon which it is predicated. There are quite as many which hold that issues can only be raised by appropriate allegations of fact and that if a court goes beyond the issues so raised, its judgment is void.

Notwithstanding the elementary nature of this principle, we quote from a number of authorities which present it in its various aspects and phases.

"Every bill must contain in itself sufficient matters of fact per se, to maintain the case of the plaintiff; so that the same may be put in issue by the answer and established by proofs. The proof must be according to the allegations of the parties, and if the proofs go to matters not within the allegations, the court cannot judicially act upon them as a ground for its decision; for the pleadings do not put them in contestation." *Harrison vs. Nixon*, 9 Pet., 483. (Opinion by Mr. Justice Story.)

"If indeed, it were true in fact that the bill does not allege this incompetency, so as to put it in issue, the objection would be conclusive, for it is well settled

that the decree must conform to the allegations of the parties."

Harding vs. Handy, 11 Wheat., 103. (Opinion by Chief Justice Marshall.)

"In equity a party can no more succeed upon a case proved but not alleged, than upon a case alleged but not proved."

Foster vs. Goddard, 1 Black, 506.

"No rule is better settled than that the decree must conform to the allegations as well as to the proofs in the cause."

Chief Justice Marshall in Crocket vs. Lee, 7 Wheat., 522.

"In the case of Smith vs. Ontario, 18 Black, 454, Circuit Judge Wallace observed that 'the matter in issue' has been defined in a case of leading authority as 'that matter upon which the plaintiff proceeds by his action and which the defendant controverts by his pleading.'"

Reynolds vs. Stockton, 140 U. S., 254.

In Outram vs. Moulwood, 3 East., 346, Lord Ellenborough said:

"It is not the recovery but the matter alleged by the party and upon which the recovery proceeds which creates the estoppel."

"A recovery must be had, if at all, upon the facts alleged."

11 Ency. Plead & Prac., 868.

Notwithstanding the necessity of appropriate allegations of fact to support a decree, counsel have never heretofore contended that either the original or supplemental bill contains any

avement of the city's purpose to erect a waterworks system of its own to be operated only after the expiration of the franchise and never in competition with the plant of appellee.

It has been urged, however, with much emphasis, that appellant's right to build waterworks for any purpose whatsoever, including that of operating them only after the expiration of the franchise, was put in issue by the prayer for relief in the supplemental bill. Indeed, it may fairly be said that the claim that it was in issue is founded solely on this prayer.

They say in effect that whether or not it was alleged that the city intended to build waterworks to be operated after the expiration of the franchise, the prayer for relief "that the defendant be precluded and restrained and enjoined from constructing waterworks of its own in said city until the expiration of your orator's contract," put in issue the city's right to construct waterworks at any time, under any circumstances and for any purpose, including that now entertained by it.

We think that a careful reading of the prayer shows that it was not intended to ask for any relief other than an injunction against the building and maintaining of a competing waterworks system.

The first paragraph of the prayer is that the defendant be enjoined from "issuing and selling said bonds for the purpose of building and constructing waterworks of its own in competition with your orator," while the second is that "the defendant be precluded and restrained and enjoined from constructing waterworks of its own in said city until the expiration of your orator's contract."

It is clear, we submit, that the pleader, having first asked an injunction against the issuance of bonds to construct waterworks to be operated in competition with the existing plant, conceived the thought that the city might be able to erect such a plant without issuing bonds, and in order to cover the entire situation and prevent it from so doing either with or without the issuance of bonds, the second part of the prayer was added. We cannot believe that there was any purpose to make the in-

junction against building waterworks without issuing bonds broader than that against erecting them with the proceeds of a bond issue, and yet the prayer for the injunction, insofar as it relates to the erection of waterworks by the issuance of bonds is expressly limited to those to be operated in competition with the existing plant, while where it relates to the erection of waterworks without the issuance of bonds if literally construed it asks an injunction against constructing them at all. We repeat that it is manifest to us that the pleader, being thoroughly impregnated with the situation as it existed and with the threatened competition of the city which he sought to avoid, used the word construct as synonymous with the phrase "construct and operate." This interpretation is the only one which harmonizes the prayer for relief with the allegations of fact upon which it is based and of course all parts of the bill are to be construed together.

While, therefore, we do not concede that the prayer for relief was intended to be broader than the supporting averments of fact, we submit that even if we be wrong as to this, it cannot be given that effect. It is universally held that issues cannot be enlarged or extended by praying relief which the case made by the bill does not warrant. A special prayer for relief may narrow the issues presented, by not asking as extensive relief as the complainant is entitled to, but it can never be so framed as to enlarge the scope of the bill. This has been many times held by this and other courts.

"A special prayer must, to be available, be supported by the averments of the bill."

16 Cyc. 225.

Station vs. Rising, 103 Ala., 454.

"There must be proper connection and dependency between allegations and relief prayed for."

Thoms vs. Thoms, 45 Miss., 263.

"Relief granted under prayer for general relief must be appropriate to the allegations of the bill."

English vs. Foxall, 2 Pet., 595. Taylor vs. Merchants Fire Ins. Co., 9 How., 390.

"It is a well settled rule that the complainant if not certain as to the specific relief to which he is entitled, may frame his prayer in the alternative; so that, if one kind of relief is denied another may be granted; the relief of each kind being consistent with the case made by the bill."

Hardin vs. Boyd, 113 U. S., 756.

"We agree that the relief granted under the prayer for general relief must be agreeable to the case made by the bill; the case made by the bill consists of the material facts therein stated; and where all the facts are stated it is no reason for denying relief, under a general prayer, because it may differ from the theory of the law upon which the specific prayer for relief is based, where both prayers are based on the same facts, clearly set forth in the bill."

Lockhart vs. Leeds, 195 U. S., 427.

"And if the facts would justify a prayer for any such relief the bill should have been framed with a double aspect. So that if the court should decide against the complainant in one view of the case, it might afford him relief in another."

Hobson vs. McArthur, 16 Pet., 182.

The above authorities show conclusively, we think, that the prayer for relief as distinguished from the allegations of fact is of small consequence in determining the question of estoppel.

As we have shown, the rule is universally established that the party pleading an estoppel by judgment can support his

claim by putting in evidence the entire record of the case relied upon, including the proof taken to sustain the issues joined. Indeed, an important test of whether an estoppel exists is to compare the proof used to sustain the respective allegations of the two suits. In *Stone vs. United States*, 64 Fed., 667, which was affirmed by this court in 167 U. S., 178, it was said:

"One of the safest rules for courts to follow in determining whether a prior judgment between the same parties concerning the same matters, is a bar, is to ascertain whether the same evidence which is necessary to sustain the second action, if it had been given in the former suit, would have authorized a recovery therein."

Again, in *Clarke vs. Blair*, 14 Fed., 812, the court said:

"If different proofs be required to sustain the two actions a judgment in one of them is no bar to the other."

The doctrine is thus stated in *Freeman on Judgments*, 259:

"The best and most invariable test as to whether a former judgment is a bar is to inquire whether the same evidence will sustain both the present and the former action."

If in fact, therefore, the identity of issues necessary to constitute an estoppel exists in Cause No. 41 Equity and the case at bar, counsel for appellee might naturally have been expected to resort to this "best and most invariable test" and introduce in evidence the testimony taken in both cases in order that it might be compared. They did not do so, however, but the

transcript of record used on the appeal to this court of the case which we have designated as Cause No. 41 Equity, which was numbered 133 on the docket of this court at the October Term, 1905, contains all of the evidence taken and forms part of the records of this court, and if any doubt whatsoever should exist as to the utter dissimilarity of the issues in that cause and in this, we trust that the court will compare the testimony in both cases. It will be seen that in the prior case the testimony of the witnesses examined on behalf of the complainant was devoted exclusively to establishing the purity of the water supply, which was attacked in the city's answer as a ground for the annulment of the franchise, and to showing that the waterworks had been constructed in compliance with the requirements of that instrument. The documentary evidence consisted of copies of the franchise, of the act of the legislature under which the bonds were to be issued, of the deed of trust and deed of foreclosure, and of the ordinances and resolutions of the city council relating to the proposed building of waterworks and issuance of bonds.

In the case at bar the testimony of the complainant, except insofar as it concerns the franchise, the pleadings in the former case, and the resolutions and ordinances relating to the issuance of bonds to construct waterworks, is devoted to an utterly irrelevant recital of every entry on appellant's minutes concerning its various controversies and negotiations with the appellee since the final determination of Cause No. 41 Equity, to a verbose narrative which assumes to tell of the efforts made to compromise various controversies, to an extended and elaborately detailed statement pretending to show the value of the present waterworks, to newspaper articles and circulars, and to similar matters. Every particle of evidence in the second case, except the franchise itself, if it can be so described, concerns things which have occurred since Cause No. 41 Equity was decided. The contract between the parties is, therefore, the only proof used in both cases, and if the evidence

be resorted to as a means to determine whether an estoppel exists, the conclusion must necessarily be reached that the two cases are wholly dissimilar.

An examination of the pleadings and of the testimony in the two cases, and a consideration of the issues, respectively involved, leads necessarily to the conclusion that the only point of similarity rests in the fact that in both cases the water works company sought to enjoin the city from building waterworks. The facts upon which the two controversies were founded were in no wise related. The relief prayed for, however, was the same, and it is upon this coincidence that appellee's claim of estoppel is founded.

In dealing with a similar contention this court in *County of Mobile vs. Kimball*, 102 U. S., 691, said:

"The two suits, though seeking the same relief, rest upon a different state of facts, and the adjudication in the one constitutes, therefore, no bar to a recovery in the other."

The city adopted its plan to build waterworks at a time when the franchise has almost expired to be held in readiness to supply water at that time, many years after the decision of Cause No. 41 Equity, and its rights in the premises depend, therefore, upon a state of facts which has arisen since the rendition of the decree in that case. It necessarily follows that nothing which was decided at that time can constitute an estoppel.

"Of course, a judgment being conclusive only upon matters within the issues, it is not an estoppel as to after-occurring facts not involved in the suit in which the judgment was rendered"

2 Black on Judgments, Sec. 617.

"If the allegations of a bill refer to the condition of things at the time the bill is filed, the relief afforded must be limited to that state of facts."

Winnipiseogee Lake Co. vs. Young 40 N. H., 420.

"An adjudication is conclusive only as to those matters capable of being controverted between the parties at the time and as to conditions then existing, and cannot operate as an estoppel to another action or proceeding which, though involving the same rights passed upon, is predicated upon facts which have arisen subsequently to the former adjudication."

24 Am. & Eng Ency. of Law, 777.

"The estoppel of a judgment extends only to the facts as they were at the time the judgment was rendered, and to the legal rights and relations of the parties as fixed by the facts so determined; and when new facts intervene before the second suit, furnishing a new basis for the claims and defenses of the parties respectively, the issues are no longer the same, and consequently the former judgment cannot be pleaded in bar."

23 Cyc. 1161.

"The estoppel of a judgment extends only to the facts in issue as they existed at the time the judgment was rendered, and does not prevent a re-examination of the same questions between the same parties where in the interval the facts have changed or new facts have occurred which may alter the legal rights or relations of the litigants."

Ib. 1290.

As we have so often said, the water company could not have alleged a purpose on the part of the city which did not then exist to await the practical expiration of the franchise and then build waterworks to operate thereafter, and the city could

not have defended upon the ground that it had the right to do so when indeed it had no such intention. It would have been wholly inconsistent for the city to have answered, as it did, admitting its purpose immediately to build and operate water-works in competition with the water company, and at the same time aver its purpose to construct a plant four years before the expiration of the franchise with no intention to operate it until after that time. When the city defended upon the ground of the invalidity of the franchise and its right and present intention to compete, it excluded all possibility of a decision as to its right at a future time to build a non-competing plant. That issue had not arisen at the time of the decision of Cause No. 41 Equity, and it ought not to require the citation of authority to show that an issue cannot be determined until the facts upon which it must be predicated have occurred. If authority be needed, however, it is found in the decision of this court in *Third National Bank of Louisville vs. Stone*, 174 U. S., 432, where it was said:

"A question cannot be held to have been adjudged before an issue on the subject could possibly have arisen."

Courts refuse to be drawn into the determination of mere abstract principles of law; they decline to construe possible future controversies which have not yet arisen; it is not their province to deal with vague general questions as to the relative rights of parties to contracts and to construe their provisions in advance; they do not decide moot questions.

"Abstract questions of law cannot be made the subject of litigation. There must be real parties and a res in dispute that will become *res adjudicata* when the litigation is determined."

State ex rel Wright vs. Savage, 64 Neb., 684.

"A court will express an opinion upon questions of law when it becomes necessary to do so in determining controverted rights of persons or of property, but it cannot decide moot questions."

State ex rel Westenhaver vs. Lambert, 52 W. Va., 248.

"The courts will not construe contracts until actual issues have arisen from them."

N. O. & N. W. R. R. Co. vs. Lincoln Ferry Co., 104 La. Ann., 53.

The fact that the bill in Cause No. 41 Equity sought injunctive relief is also important as showing that the city's power to do what it now proposes to do could not have been in issue in that controversy. We have pointed out that at the time that suit was instituted the city had no thought of waiting until the practical expiration of the franchise to build waterworks to be operated only thereafter, but on the contrary made the wholly inconsistent claim of its right then to build competing waterworks, and the purpose of the suit was to prohibit such action. The city had threatened to build and operate a waterworks system and subject the existing company to its competition, and the aid of the court was appropriately invoked to prevent this injury. It had never threatened to build non-competing waterworks upon the termination of the franchise and even if this constituted an infringement of the complainant's rights, upon familiar principles, it could not have procured an injunction against the doing of an act which had never been threatened or even contemplated. While it is an important function of courts of equity to prevent threatened wrong or injury, they do not undertake to allay mere apprehension which is founded upon no threat, and upon a possibility which can only arise ten or more years in the future.

"There is no power the exercise of which is more delicate, which requires greater caution, deliberation

and sound discretion, or more dangerous in a doubtful case, than the issuing an injunction. It is the strong arm of equity, that never ought to be extended, unless to cases of great injury, where courts of law cannot afford an adequate and commensurate remedy in damages. The right must be clear, the injury impending and threatened so as to be averted only by the preventing, protective process of injunction."

Truly vs. Wanzer, 5 How., 141.

"An injunction will not lie to prevent a possible future injury. A concrete case must be presented."

Richmond R. Co. vs. Louisa R. Co., 13 How., 71.

It follows from what we have said that at the time Cause No. 41 Equity was begun it would not have been possible to have presented the controversy involved in this case for decision. If the bill had set forth in clear and unambiguous terms the city's purpose immediately to build, under existing legislative authority, and operate in competition with the complainant, a waterworks system, and in the alternative that if it should be prohibited from doing this, that it might possibly ten years thence build under authority to be subsequently conferred, a system of waterworks to be operated only upon the termination of the franchise, no court would have undertaken to render a decree enjoining the city from doing both of these things. On the other hand, the city could not have answered the bill in Cause No. 41 Equity by asserting, first, its intention immediately to build and compete, and, second, the possibility that if this right be denied it, it might in the distant future, build with no intention to compete. The bill did not and could not allege the existence of such a future possibility, and if the city had asserted such a right, it would have been wholly irrelevant and unresponsive to the bill of complaint.

If, therefore, neither the complainant nor the defendant, by precise and unambiguous averments, could have put in issue

the right which the city now seeks to exercise, and if the court could not have rendered a decree which in terms prohibited it, how can the averments of the pleadings, by subtle argument and technical refinements, be held to have done indirectly what could not have been directly done, and how can the decree be distorted into holding what the court had no power, under any circumstances, to decide?

While we have undertaken to show that the question here involved could not have been litigated in Cause No. 41 Equity, it must be remembered that it devolves upon appellee to show, not only that it could have been but was in fact adjudicated. This follows from the consideration that the two causes of action or demands are different. As we have said, the courts observe the utmost strictness in applying the doctrine of *res adjudicata* to avoid injustice. Unless the record affirmatively shows that Cause No. 41 Equity could not have been decided without the determination of the questions here at issue, there is no estoppel.

"The general rule of law is that a judgment is conclusive by way of estoppel only as to facts without the existence and proof or admission of which it could not have been rendered."

Bigelow on Estoppel, 82.

"If the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties."

Washington A. & G. Steam Packet Co. vs. Sickles,
5 Wall., 580.

The case of *Russell vs. Place*, 94 U. S., 606, from which we have already quoted strongly illustrates the reluctance of the courts to hold that the exercise of rights or the interposition of

defenses is barred when they may never have been judicially passed upon. The action was for damages for the infringement of a patent, and the defense was based upon its invalidity. It was urged that this defense was barred because in a prior litigation between the parties a judgment was recovered for damages for a violation of the exclusive privileges secured by the patent. The court, after quoting from a number of its prior decisions, to which we have heretofore alluded, pointed out that the record did not disclose the nature of the infringement for which damages were recovered, that the patent contained two claims, and that it did not appear which was held to have been infringed in the prior litigation. It then said:

"A recovery for an infringement of one claim of the patent is not of itself conclusive of an infringement of the other claim, and there was no extrinsic evidence offered to remove the uncertainty upon the record; it is left to conjecture what was in fact litigated and determined. The verdict may have been for an infringement of the second; it may have been for an infringement of both. The validity of the patent was not necessarily involved, except with respect to the claim which was the basis of the recovery. A patent may be valid as to a single claim and not valid as to the others. The record wants, therefore, that certainty which is essential to its operation as an estoppel, and does not conclude the defendants from contesting the infringement or the validity of the patent in this suit."

We do not see how it can even be contended that the decree in Cause No. 41 Equity, whereby the city was enjoined from constructing and operating a competing system, could not have been rendered without the further holding that it might not in the distant future build waterworks not to compete with the existing company, but only to be operated after its right to furnish water had expired.

Having argued, and we think shown, that the question now

presented was not and could not have been litigated in Cause No. 41 Equity, it is unnecessary, we think, to argue that the decree in that cause could have been rendered without deciding the matter now in issue. The two questions depend upon wholly distinct allegations of fact and utterly different principles of law. To say that one could not be decided without determining the other, is to state an anomaly. And yet the decree of the District Court and its affirmance by the Circuit Court of Appeals can only be justified upon the theory that both tribunals found that the two cases were so identical that the decision of one necessarily and unavoidably involved the determination of the other. We cannot think that these courts in fact reached such an impossible conclusion. It must be, we think, that they misconceived the principles of law upon which the doctrine of estoppel is founded.

Counsel for appellee base their claim of estoppel quite as much upon the opinion of this court as reported in 202 U. S., 453, as upon the decree appealed from, and both the District Court and the Circuit Court of Appeals also founded their conclusion upon that opinion as well as upon the decree. While we do not think that issues can be enlarged by the opinion of an appellate tribunal, we are not only willing but anxious that this court examine its opinion, in order that it may observe the interpretation then placed by it upon the matter in issue. It will appear, we think, beyond a doubt that it never considered the general right of the city to build waterworks for any purpose whatsoever, but confined its decision as it did its discussion to the right to compete with the water company.

In order that this may be made perfectly clear we give herewith a number of quotations from the opinion:

"The suit was brought by the water works company, claiming an exclusive right, as against the city, under a contract with it for the construction and maintenance for a period of thirty years of a system of waterworks, which exclusive contract, it was alleged,

would be practically destroyed if subjected to the competition of a system of waterworks to be erected by the city itself, which was in contemplation under authority of an act of the legislature of Mississippi, authorizing the Mayor and Aldermen of the City of Vicksburg to issue bonds to the amount of \$375,000.00 to purchase or construct a waterworks system and a sewer system, and for certain other purposes."

"The principal controversy in the case is as to the correctness of the decree of the court below restraining the city from *erecting* waterworks of its own within the period named in the contract, which decree proceeded upon the theory that the city had excluded itself from *erecting or maintaining* a system of waterworks of its own during that period."

"The question is now, not whether the city might make a contract giving the exclusive right as against all third persons to *erect, a system of waterworks*, but whether it can, in exercising this legislative power, exclude itself from *constructing and operating waterworks* for the period of years covered by the contract."

"And we think the question of the power of the city to *exclude itself from competition* is controlled in this court by the case of Walla Walla vs. Walla Walla Water Co., 172 U. S. 1."

"In the Walla Walla case the same general power to make the contract existed. There was an express provision against making an exclusive contract, and this court held that for the period mentioned in the contract, and as incident to the protection of the rights of the contractor, *the city might exclude itself from competition*. We think that case is decisive of the present one on this proposition."

"In considering this contract we must remember the well-established rule in this court which requires grants of franchises and special privileges to be most strongly construed in favor of the public, and that where the privilege claimed is doubtful, nothing is to be taken by mere implication as against public rights. This rule has been applied to a series of contracts in waterworks and lighting cases, and we have no disposition to detract from its force and effect. *And unless the city has excluded itself in plain and explicit terms from competition with the water works company during the period of this contract, it cannot be held to have done so by mere implication.*"

"Without resorting to implication or inserting anything by way of intendment into this contract, it undertakes to give by its terms to Bullock and Company, their associates, successors and assigns, the exclusive right to *erect, maintain and operate waterworks* for a definite term, to supply water for public and private use. These are the words of the contract and the question upon this branch of the case is, *conceding the power of the city to exclude itself from competition with the grantee of these privileges during the period named, has it done so by the express terms used?* It has contracted with the company in language which is unmistakable, that the rights and privileges named and granted shall be exclusive. Consistently with this grant, can the city submit the grantee to what may be *ruinous competition* of a system of waterworks to be owned and managed by the city, to supply the needs public and private, covered in the grant of privileges to the grantee? It needs no argument to demonstrate, as was pointed out in the Walla Walla case, that the *competition* of the city may be far more destructive than that of a private company. The city may conduct the business without regard to the profit to be gained, as it may resort to public taxation to make up for losses. A private company would be compelled to meet the grantee upon different terms, and would not likely conduct the business unless it could be made

profitable. We cannot conceive how the right can be exclusive, and the city have the right, at the same time, to *erect and maintain* a system of waterworks which may, and probably would, practically destroy the value of rights and privileges conferred in its grant. If the right is to be exclusive, as the city has contracted that it shall be, it cannot, at the same time, *be shared with another*; particularly so when such division of occupation is against the will of the one entitled to exercise the rights alone. It is difficult to conceive of words more apt to express the purpose that the company shall have the undivided occupancy of the field so far as the other contracting party is concerned."

"On the authority of the Walla Walla case, the city had the power to *exclude itself for the term of this contract*, giving the words used only the weight to which they are entitled, without strained or unusual construction, and we think it was distinctly agreed that, for the term named, the *right of furnishing water to the inhabitants* of Vicksburg under the terms of the ordinances was vested solely in the grantee, so far, at least, as the city's right *to compete* is concerned."

After thus exhaustively and with painstaking care stating again and again that the question under consideration was whether or not the city could compete with the water works company, and after constantly using the words "construct" or "erect" as synonymous with the phrase "erect, maintain and operate," the court concluded its opinion with the following language:

"We find no error in the decree of the Circuit Court enforcing the contract rights of the complainant and enjoining the city from erecting its own waterworks during the term of the contract, but error in granting a mandatory injunction as to the sewer, and in that respect the decree will be modified, and as so modified affirmed."

Although the true scope of the decision and the ground upon which it was founded were made perfectly clear by the opinion, counsel for appellee have seized upon the concluding words as supporting their contention that this court decided that the city cannot build waterworks to be operated after the expiration of the franchise. The discussion of the city's right to build waterworks was confined entirely to its right to compete with the existing company, and after arguing the matter elaborately the court finally based its decision that the city could not thus compete upon the Walla Walla case, which it accepted as conclusive of the city's inability. The Walla Walla case dealt solely with a city's right to exclude itself from competition with the grantee of a franchise, and had not the slightest connection with the question now involved. The resolutions and ordinances of the city upon which this suit is founded expressly deny any intention to compete. The fact, therefore, that the city's right to build was denied upon the authority of the Walla Walla case, is conclusive evidence that the power to build, with no intention to compete was never considered. If this court in fact intended to decide the question now involved it could not have referred to the Walla Walla case as of controlling importance. There is not an argument used in the opinion which is relevant to the question now presented. Not an authority was cited which can be used in the decision of the present controversy. It is inconceivable that under these circumstances the court intended that its opinion should be given the effect claimed. The city's right to build waterworks to be operated after the expiration of the franchise was not alluded to in the pleadings, was not referred to in the decree, was not mentioned in the opinion of the court, depends upon a new and different state of facts, was not necessary to the decision of the prior case, involves entirely different principles of law, and yet it is said that because this court concluded its opinion with the language above quoted, the city is estopped from carrying out its present plan.

As we have pointed out in the opinion the word "erect" was

constantly used as synonymous with the phrase "erect and operate." The court was dealing with the question of the right to compete, and it would have been an unnecessary prolixity for it, each time it had occasion to use the word "erect" to have added language showing that it means to erect with the purpose of competing. No issue was made as to the city's right to erect without competing, and consequently the court was not under the necessity of drawing a distinction between erecting without operating and erecting for the purpose of competition. Counsel, however, have seized upon every paragraph of the opinion in which the word "erect" was used alone and have insisted that the court meant that the city had no right to erect even without competing.

Pursuing the same tactics, they emphasize the fact that the city assigned for error the decree enjoining it from erecting waterworks during the life of the franchise. They argue that because the city used the very language of the decree in assigning error it cannot now contend that that language is open to construction or must be limited to the facts before the court. It was, of course, natural that the assignment of errors should follow the language of the decree. It was never intended to raise the question whether or not the decree was erroneous because it enjoined the city from erecting waterworks at any time and for any purpose, including that now entertained by it.

It was meant to present to this court the city's claim that there was error in enjoining it from erecting waterworks for the purpose of competing with the existing company. It may fairly be said, we think, that appellee's entire claim of estoppel is founded upon a quibble on words. They rely upon the exact language of the decree insisting that it is not open to construction in the light of the controversy pending before the court which rendered it, and they apply precisely the same reasoning to the phraseology of this court's opinion. It would be exceedingly dangerous for courts to write opinions if dis-

connected portions thereof might be applied to conditions which were not present in the minds of the court when they were delivered, and be given a decisive effect as to wholly dissimilar disputes. Recognizing this principle, this court, in *Harriman vs. Northern Securities Co.*, 197 U. S. 244, said:

“General expressions in an opinion which are not essential to the disposition of the case cannot control the judgment in subsequent suits.”

We feel sure that a reading of the entire opinion will demonstrate that it was never intended to decide the question now presented.

This court had occasion in disposing of the controversy which we have described as Cause No. 97 Equity and which is reported in 206 U. S., 496, to itself define the scope and effect of its opinion in the case we have been discussing. This it did in the following language:

“While it is true that the decree is very broad, we cannot agree to the contention of the appellee that it finally disposed of the matter now in controversy. When the case was first here, reported in 185 U. S., 65, while there are expressions in the opinion affirming the validity of the contract and the authority of the city to make it, the issue really decided was as to the jurisdiction of the court as a Federal Court, which was sustained, and the cause remanded for further proceedings. Upon the second hearing of the case, and the appeal here, the opinion shows that the adjudication was regarded as settling the right of the Vicksburg Water Works Company, under the contract, to carry on the business *without the competition of waterworks to be built by the city itself, as the city had lawfully excluded itself from the right of competition*; and it was further held, as incidental to that controversy, in passing upon an issue made in the suit, that the Vicksburg

Water Works Company had succeeded to all the right, title, and interest of the original contracting party, and that the contract, having been made prior to the Constitution of 1890, was not controlled by its provision."

It will be seen that, unlike counsel for appellee, this court construed its decision as relating only to the city's right to compete.

If, however, the court misconstrued its own decision and counsel are correct in their view that it did decide that the city had no right to prepare for its duty of furnishing water to its inhabitants by building a plant to be put in operation upon the termination of the franchise, it is, we submit, singular that it made no allusion to its prior decision in the El Paso case, *supra*. As we pointed out in a former portion of our argument, it was expressly held in that case that by doing what the corporate authorities of Vicksburg now intend, the city of El Paso violated no right of the water company, and the two decisions, if counsel's interpretation be accepted, are utterly irreconcilable. The El Paso case was decided March 5, 1894, and the Vicksburg case in May, 1906, and yet it is said that the former was overruled by the latter, although it was not even alluded to in the opinion. A number of justices participated in the decision of both cases, and it cannot be assumed that when the Vicksburg appeal was decided they were not familiar with the prior El Paso case.

This court, in disposing of the former appeal, could not have decided the question now presented without disregarding many of its prior decisions, a number of which we have heretofore cited, as well as the El Paso case, nor could it have done so without abandoning the fundamental principles of law which require decrees to be construed with regard to the issues presented. An instructive case, which illustrates the liberal attitude assumed by this court in construing decrees, is that of *Conway vs. Taylor's Executor*, 1 Black, 603, which involved a

ferry franchise, which it was claimed had been violated by the owners of a boat known as the "Commodore." A decree was entered perpetually enjoining its owners "from landing the boat called in the pleadings and proof the 'Commodore,' or any other boat or vessel upon that part of the Kentucky shore of the Ohio River lying between the lots of the City of Newport and the Ohio River designated upon the plat of the town of Newport as the 'esplanade' and including the whole open space so designated, for the purpose of receiving or landing either persons or property ferried from, or to be ferried to, the opposite shore of the Ohio, River."

An appeal was taken to the Court of Appeals of Kentucky, which held that the injunction was too broad because it restrained the "Commodore" and the defendants in landing upon the slip in question, persons and property transported from the Ohio shore, and in adjudging the exclusive right of ferrying from both sides of the river to be in plaintiffs. The court expressly held, however, that the defendants "might have been restrained or prohibited, *under all or any circumstances*, from transporting persons or property from this to the other side (within the interdicted distance above or below an established ferry on this side) unless authorized under the laws of this state to do so."

An appeal was taken to this court, which in dealing with the question of the injunction, said:

"Lastly, it is urged that the Commodore, having been enrolled under the laws of the United States, and licensed under those laws for the coasting trade, the decree violates the rights which the enrollment and license gave to the appellant in respect of that trade by obstructing the free navigation of the Ohio. Here it is necessary to consider the extent of the injunction which the decree directs to be entered by the court below. The counsel for the appellants insists that 'as respects transportation from the Kentucky side, and from the Commodore's wharf at the foot of Monmouth

street, that vessel is enjoined, under 'all or any circumstances, from transporting persons or property' to the opposite shore, unless under authority of the State of Kentucky.'

"We do not so understand the decree. If we did, we should, without hesitation, reverse it. An examination of the context leaves no doubt, in our minds, that the court intended only to enjoin the Commodore, under 'all or any circumstances, from transporting persons or property' from the Kentucky shore in violation of the ferry rights of the appellees, which it was the purpose of the decree to protect. The bill made no case, and asked nothing, beyond this. The court could not have intended to go beyond the case before it. That the appellants had the right after as before the injunction, in the prosecution of the carrying and coasting trade, and of ordinary commercial navigation, to transport 'persons and property' from the Kentucky shore, no one, we apprehend, will deny. The limitation is the line which protects the ferry rights of the appellees. Those rights give them no monopoly, under "all circumstances," of all commercial transportation from the Kentucky shore. They have no right to exclude or restrain those there prosecuting the business of commerce in good faith, without the regularity or purposes of ferry trips, and seeking in nowise to interfere with the enjoyment of their franchise. To suppose that the Court of Appeals, in the language referred to, intended to lay down the converse of these propositions, would do that distinguished tribunal gross injustice."

It will be seen that it was argued that because the vessel was enjoined "*under all or any circumstances* from transporting persons or property" this language must be given its full literal effect without limitation or proper application to the facts which is the precise contention here made. The court, however, refused to accept this view, and construed the injunc-

tion to mean that persons should not be transported "*in violation of the ferry rights of the appellees.*" It interpolated these words into the injunction in order that it might be upheld. We submit that the same rule should be applied in the case at bar, and that even if the injunction in Cause No. 41 Equity had in express terms purported to restrain the city "from erecting waterworks under all or any circumstances during the life of the franchise" it should be construed to mean that waterworks cannot be constructed during that period in violation of the restrictions imposed by the franchise. The injunction in Conway vs. Taylor's Executor was much broader than in Cause No. 41 Equity, because of the use of the words "under all or any circumstances." The City of Vicksburg was simply enjoined from "erecting waterworks," while the litigants in that case were enjoined "under all or any circumstances" from transporting persons or property.

Although the court did not hesitate to disregard the words "under all or any circumstances" and interpolate in the decree language restricting its operation to the issues it was intended to decide, counsel now insist that the words "under all or any circumstances," or a phrase of similar meaning, be read into the decree under discussion, so that it will have the effect of prohibiting the erection of waterworks under any and all conditions, whether violative of appellee's rights or not.

Prior to the rendition of the decree this court had held in the El Paso case that a city which had granted an exclusive franchise, could nevertheless construct waterworks provided they were not to be operated until after its termination. When, therefore, the City of Vicksburg was enjoined from erecting waterworks during the life of the franchise, it could not have been intended that it be prohibited from erecting them under any and all circumstances, including even a condition and purpose which in the El Paso case had been held to violate no obligation of the franchise.

Moreover, if the decree be construed to prohibit the erec-

tion of waterworks under any and all circumstances, the city would not have the power to do so even if the appellee should do anything to forfeit its franchise or if it should become disabled from performing its obligations thereunder. We submit that the method of interpretation adopted by this court in the Conway case should be applied to the decree now under consideration, and that its true meaning is that the City of Vicksburg cannot erect waterworks in violation of appellee's rights under the franchise. If this construction be adopted the claim of estoppel falls to the ground.

It was held in Cause No. 41 Equity that the erection by the city of waterworks with the intention of competing was a violation of the franchise, and it was accordingly enjoined therefrom. It now proposes to erect waterworks under wholly different conditions and for an utterly dissimilar purpose, and the question of whether in so doing it will violate appellee's rights under the franchise is open for consideration.

There can be no doubt whatever that the question now presented has never been in fact adjudicated, and if it shall be held that the city is estopped from asserting its right to build waterworks by way of preparation for the performance of its duty to furnish water when the present means of supply ceases, it will indeed have been condemned unheard.

THIRD.

APPELLEE IS NOW ESTOPPED TO ASSERT THAT THE CITY CANNOT ERECT A WATERWORKS SYSTEM TO BE OPERATED AFTER THE TERMINATION OF THE FRANCHISE.

It is alleged in the answer, and shown by the testimony that from time to time, beginning in the early part of 1910, the city has laid water mains under such streets as it has paved,

with the intention that they should finally form part of a system of waterworks which the city contemplated building and operating after the expiration of the present franchise. These mains were laid because of the city's desire to avoid the necessity of tearing up and thus mutilating new pavements in order to lay mains and make connections with the premises of abutting property owners.

Just before the case at bar came on for hearing in the District Court at the January Term, 1912, the city had advertised for bids and was about to lay other mains under streets which it proposed to pave when appellee procured a temporary restraining order prohibiting it from so doing on the ground that mains are part of a waterworks system and that it was precluded by the franchise from erecting any portion thereof. This temporary restraining order was made permanent in the final decree.

Long before the restraining order was granted, or this suit filed, beginning, as we have said, early in 1910 and continuing over the intervening years, the city had laid mains, for which it had paid sums amount to about \$30,000.00, and although the contracts and proceedings incidental thereto were matters of public notoriety and were within the knowledge of the Vicksburg Water Works Company, it made no protest on the ground that its franchise prohibited the city from building waterworks. The testimony shows that on the contrary it wrote two letters to the City of Vicksburg, dated Oct. 16, 1910, in which it assumed the position that the city had the right to lay water mains of its own, provided they were first authorized by a vote of the people. This is wholly inconsistent with the suggestion that the franchise prohibits the laying of such mains, because if it does the people could not by their vote change the obligations of the contract.

The record further shows that after the writing of these letters the receiver of the water works company in its behalf instituted two suits, one in the District Court and one in the

Chancery Court of Warren County, Mississippi, against the contractors who had laid certain of the water mains in question, seeking to recover for and on behalf of the city, though against its protest, the amounts paid them on the theory that the contracts for the laying of the mains were illegal because the city had exceeded its debt limit.

These things constitute not only an estoppel to say that the laying of the mains was prohibited by the franchise, but are of the utmost importance as showing an acquiescence in the construction placed by the city on that instrument. It is a well known principle of law that the courts will accept wherever it is possible to do so, the construction placed upon a doubtful contract by the parties thereto. Inasmuch as the water works company was endeavoring to prevent the laying of water mains, and conceded that the city had a right so to do, if authorized by its people, this was a contemporaneous construction by both parties to the contract that it did not have the effect now claimed for it.

"In cases where the language used by the parties to a contract is indefinite or ambiguous, and hence of doubtful construction, the practical interpretation of the parties themselves is entitled to great, if not controlling, influence. The interest of each generally leads him to a construction most favorable to himself, and when the difference has become serious and beyond amicable adjustment, it can be settled only by the arbitrament of the law. But in an executory contract, and where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the court as the true one."

Topliff vs. Topliff, 122 U. S., 121.

We submit that the general principles of estoppel in pais apply in full force to the present situation. The water works company and its receiver, have with full knowledge permitted

the city to expend about \$30,000.00 in laying water mains without ever asserting that it was prohibited by the franchise. After waiting several years during which they acquiesced in the city's right to lay these mains, they now come into court and say that it is forbidden by the franchise. If the city shall now be prohibited from laying any other water mains or from building a waterworks plant, the \$30,000.00 heretofore expended with the full knowledge and acquiescence of the water works company, will be absolutely thrown away. If that company conceived that the laying of the mains violated its franchise it was its duty to say so, so that the city could save itself the unnecessary expenditure and consequent loss of this large sum of money. The silence of the water company has thus misled the city to its hurt and it is estopped now to speak.

Philadelphia W & B. R. R. vs. Dubois, 12 Wall. 47.

The truth of the matter is that the idea that the franchise or the former decree of this court prohibits the city from constructing waterworks to be operated after the termination of the franchise, never occurred to appellee until within the last year. There cannot be the slightest doubt that if they had entertained such a thought before they would at once have endeavored to prevent the laying of the mains on that ground.

FOURTH.

THE CITY SHOULD NOT BE ENJOINED FROM ERECTING WATERWORKS TO BE OPERATED AFTER THE EXPIRATION OF THE FRANCHISE, FOR THE REASON THAT SUCH A DECREE WOULD AT THIS TIME BE INEQUITABLE.

We have shown, we think, that the relative situation of the parties to this controversy is wholly different from that which existed at the time of the rendition of the decree in Cause No. 41 Equity. As we have pointed out, at that time the

franchise had many years to run and the city was denying its validity and proposed to build a waterworks system to be operated at once in competition with the water works company. Now the franchise is about to expire, the city recognizes its validity and concedes that up to the moment of its expiration it must permit the full and free exercise of the privileges and rights conferred thereby, and only intends to build waterworks to be put in operation after the rights granted by the franchise have terminated. Whatever, therefore, may have been the relative equities of the parties at the time of the prior hearing, they are now wholly different and we submit that without regard to the technical meaning of the former decree the situation is so changed that it would be inequitable to enforce it in the manner sought by the bill of complaint. Appellee having come into a court of equity, as complainant, asking equitable relief, has not the right to insist that the decree be literally enforced, when by reason of the changed situation of the parties, it would be inequitable so to do.

This was expressly held by the Circuit Court of Appeals of the Eighth Circuit in *St. Louis, etc., R. Co. vs. Wabash R. Co.*, 152 Fed., 849. The court said:

"Finally, counsel contend that this is not a 'hard and fast' decree; that the Colorado Company is applying to a court of equity to enforce it; that the court should not grant inequitable relief; and that any broader relief than that given by the decree challenged by this appeal would be of this character.

"A decree for the joint use of railway facilities may be fair and just when rendered, and such radical changes may subsequently be wrought that its continued enforcement would work great injustice. A court of equity always has the power and the judicial discretion to refuse to compel inequity and to condition the relief it grants with the requirement that he who seeks equity shall do equity. If such changes in the situation, rights or relations of these parties had occurred subsequent to the entry of this decree that its

continued enforcement would be unjust, the courts would withhold their aid or condition it by new and equitable terms. But the original decree was conclusive of the rights and remedies of the parties at that time and thereafter until subsequent changes of conditions rendered some modification of the relief it granted just and equitable."

FIFTH.

THE BONDS WERE LEGALLY AUTHORIZED.

While both the District Court and the Circuit Court of Appeals based their holdings solely upon the ground of estoppel, the decree appealed from not only enjoins the city from building waterworks at all, but specifically enjoins it from issuing the bonds which were authorized at the election held shortly before the bill was filed.

It will no doubt be argued that even though it be held that the city has a right to build waterworks, the portion of the decree enjoining the bond issue should be affirmed. The validity of the bonds was attacked by appellee in his capacity as a tax-payer of the City of Vicksburg, and as to this feature of the case the jurisdiction of the District Court was invoked upon the ground that appellee is a citizen of Tennessee.

We will briefly discuss some of the grounds upon which the bonds are attacked.

It is claimed that the failure to give notice of the intention to issue them, as required by the city charter renders the bonds invalid.

It is unnecessary to discuss this question, because of the enactment by the legislature of Mississippi of a curative act, which is published on page 124 of the Acts of 1912, and is printed as Appendix A. hereto. This act expressly validates "all municipal bonds heretofore authorized by a legal majority of the qualified electors thereof voting at an election held for that

purpose to be issued when the municipal authorities have failed to take any of the preliminary legal steps for the issuance of said bonds."

This act was declared by the Supreme Court of Mississippi in the case of Griffith vs. Vicksburg, 58 Southern, 781, not yet officially reported, to be valid and to have the effect as intended, to cure all defects in matters of detail and preliminary proceedings. The suggestion is made in the bill of complaint that it is local legislation and that as it was not referred to the committee on local legislation as required by the constitution of Mississippi, it is void. As it expressly applies to every city in the State and has been held valid in the Griffith case, this contention cannot have been seriously made.

It is also suggested that because some persons were permitted to vote who had registered within four months prior to the bond election, it was invalid. The evidence shows that the bonds were authorized by so great a majority of the votes cast that no matter how those persons voted the result would have remained unchanged, and it was expressly held in the Griffith case that the election was not and could not have been affected thereby. Of course, upon elementary principles, the decision of the Supreme Court of Mississippi in construing its own statutes will be followed by this court, where no constitutional or other federal question is involved.

It is also urged that the Act of 1910, which is printed as Appendix B, hereto, under which, as well as the city charter, the bonds were authorized, is invalid because it applies insofar as concerns an indebtedness in excess of 10 per cent. of the assessed valuation of a municipality, only to those cities having more than 10,000 inhabitants. It is said that this is not a proper classification, and that the law, therefore, violates the constitutional provision prohibiting the enactment of special legislation in cases which can be covered by general laws. There are a great many decisions upon similar statutes, and it is a general principle that there must be some proper basis

of classification. This court in the case of *Waite vs. Santa Cruz*, 184 U. S. 302, held that:

"The subject matter of the act in question—the funding of municipal indebtedness—is peculiarly a matter pertaining to municipal organizations, and still more peculiarly a matter as to which cities of large population require different provision from that suitable to cities or towns of small population."

It expressly held that the act which classified cities according to population as regards their power to issue bonds, was not special legislation and was valid under a constitutional provision similar to that of Mississippi. We regard this case as conclusive.

It is also contended that because the city expended about \$129.00 in the publication of three newspaper articles and in the publication and distribution of a report made by Mr. A. L. Dabney, an engineer employed by it to plan a system of water-works and to estimate the value of the existing plant, the election is thereby rendered invalid. It is said that it was the city's duty to act merely as an umpire and religiously to abstain from influencing in any way the opinion of any of its voters, and that, moreover, the courts will pass upon the question of whether or not any voters could have been misled by anything which was done, written or said. The matter is thus disposed of in 1 *Dillon on Municipal Corporations*, 5 Ed., Section 213:

"In determining whether the requirements of the Constitution or statute have been complied with, the courts cannot inquire into the motives prompting persons to vote on questions submitted, where the voter freely and voluntarily exercises his right. Inducements in the way of statements and representations made to influence a voter although false and fraudulent, will not invalidate the election, if it does not ap-

pear that by force and fraud the voter was compelled to vote a way he had not desired to vote."

The same principles are enunciated in the case of *Epping vs. City of Columbus*, 117 Ga. 296, in which the court said:

"It is contended that the bonds should not have been validated because at least 32 negro voters who voted in favor of the issuance of bonds were induced to do so by false and fraudulent statements made to them by officers of the town and others interested in the issuance of the bonds. This is no ground for refusing to validate the issue of the bonds. The courts cannot inquire into the motives prompting persons to vote on questions of this character, where the voter freely and voluntarily exercised his right. Inducements held out to influence a voter, although false and fraudulent, will not invalidate the election. The rule might be different where it appeared that by force and fraud the voter was compelled to vote in a way he did not desire to vote. The allegation of the objection in the present case did not bring the case within the purview of this last statement, even if that would be the rule. Where the election is regularly called, and the voters freely and voluntarily exercise their right to vote, the election will not be invalidated simply because some of them may have been misled by some one interested in the result of the election."

We have been unable to find any intimation or suggestion except those of counsel for appellee that it is a city's duty to be merely an umpire and to refrain from seeking to influence the result of a bond election. It is immaterial whether or not the city funds were properly spent in the publications complained of, and even if they were not, that fact could have no bearing upon the question of the validity of the bonds.

Any other rule than the one announced in the authorities we have cited would lead to the most hopeless confusion and

few elections could ever be adjudged legal. If the courts, at the instance of any tax-payer are to inquire into the motives which influenced each voter in the election, and as to the truth or falsity of all of the statements made and arguments used during the preceding campaign, there will literally be no end to litigation. Each case would involve a thousand collateral issues, and the result would be confusion worse confounded.

Aside from all this, there was an utter failure to show that anybody was influenced in any way, properly or improperly, by anything that was said or done.

It is even contended that because the suggestion was made that if the bonds were authorized the existing plant might perhaps be purchased at a lower price than that demanded by its owners, this constituted an attempt to bribe the voters by holding out to them an improper inducement to vote for the bond issue.

Reliance is had upon cases holding that where a candidate for election to office made any promises or statements whatsoever which could have the effect of inducing persons to vote for him upon the idea that either they or the public would be benefited financially by his success, the election was vitiated. Some of these decisions go so far as to hold that where a candidate for office offered to remit his salary the election was nullified thereby. There is a manifest distinction between elections to determine the issuance of bonds and elections to office. The very purpose of issuing bonds is to benefit financially or materially the municipality or other governmental agency which issues them, and it has many times been held that it is not only legitimate but proper that such anticipated benefit should be explained to the voters for their information.

This distinction was drawn in the case of *Perkins County vs. Graff*, 114 Fed., 441, in which the court said:

"The first ground upon which the validity of the bonds and coupons in issue is challenged is that the

voters of the county were bribed to vote for their issue, because the proposition of the irrigation company, which they voted to accept, contained the offer 'to give employment in the construction of said canal to bona fide residents of Perkins County, Nebraska, so far as it shall not conflict with the completion of the work at the time herein stated.' But there was no corrupt or illegal inducement in this proposal. When electors are called upon to choose between great moral or political principles or between candidates for official positions, the use of any pecuniary inducement to sway the choice of the voter is illegal and corrupt. But there was no choice of principles or of persons involved in the question whether or not this county should aid the construction of this canal.

"When the question to be determined is whether or not public aid shall be given to the construction of an internal improvement within a county, city or other political division of a state, the primary question is whether or not the improvement will be of pecuniary benefit to the political subdivision and its people. The very purpose of the submission of the question to the voters is to enable them to balance in their own minds the pecuniary advantages and disadvantages which their county, city or precinct will derive from the improvement, and the taxation which must follow the aid to its construction proposed; and it is both lawful and proper that they should consider and be influenced by the gain or loss which, in their judgment, its construction will entail upon themselves and their county or city."

A similar ruling was made by the Supreme Court of Michigan in the case of Board of Supervisors vs. Wayne Circuit Court, 106 Mich., 166.

The validity of the bonds was attacked upon other technical grounds which were not set up in the bill of complaint and were not seriously urged.

Our argument has already assumed such great proportions that we will not refer to these other matters.

We trust that the great importance of this case to the City of Vicksburg and its people will serve as an apology for our prolixity.

Respectfully submitted,

T. C. CATCHINGS,
O. W. CATCHINGS,
GEORGE ANDERSON,
JOHN BRUNINI,
Solicitors for Appellant.

APPENDIX A.

CHAPTER 126.

S. B. No. 460.

AN ACT to validate all municipal bonds heretofore authorized by a legal majority of the qualified electors thereof voting at an election held for that purpose to be issued when the municipal authorities have failed to take any of the preliminary legal steps for the issuance of said bonds, and for other purposes.

Validating Municipal Bonds Heretofore Issued and Defective:

SECTION 1. Be it enacted by the Legislature of the State of Mississippi, That all municipal bonds heretofore authorized to be issued by a two-thirds majority of the qualified electors of a municipality voting at an election held for that purpose, under the provisions of Chapter 142 of the Acts of the Legislature of 1910, and of Section 3419 of the Code of 1906; or under the provisions of any municipal charter substantially in terms with the above statutes, but which have not been actually issued, notwithstanding the municipal authorities have failed to publish notice of their proposal to issue said bonds as required by said statutes or charter, or may have failed to take any of the preliminary legal steps toward the issuance of said bonds prescribed thereby, be and they are hereby in all things made valid and legal and when so issued the same shall be a binding obligation on the municipality issuing the same; and the provisions of this Act shall apply to all municipalities, whether they are operating under the municipal chapter or under their own private charter.

Sec. 2. That this Act take effect and be in force from and after its passage.

Approved March 4, 1912.

APPENDIX B.

CHAPTER 142.

H. B. No. 284.

AN ACT to provide for the issuance of bonds for municipal corporations for the construction or purchase of public utilities and public improvements, and to repeal Section 3415 of the Code of 1906, and an Act entitled 'An Act to amend Section 3014 of the Code of 1892, to authorize cities of ten thousand or more inhabitants to issue bonds for the purpose of improving or paving streets,' approved April 14th, 1905; and also an Act entitled 'An Act to amend Section 3415 of the Mississippi Code of 1906, as to bond issues of municipalities, approved March 20, 1908.

SECTION 1. Be it enacted by the Legislature of the State of Mississippi, That the corporate authorities of any municipality, whether operating under Chapter 99, of the Code of 1906, or not, for the purpose of raising money for the erection of municipal and school buildings and the purchase of such buildings or land therefor, and the improvement and adornment thereof, for the erection and purchase of water works, gas, electric and other plants, the establishment of a sewerage system, the protection of a municipality from overflow, from caving banks and other like dangers, improving or paving streets and sidewalks, and for the liquidation of existing debts of the municipality, may issue bonds or other obligations of the city, town or village, not to exceed in amount, including all outstanding bonds, seven per centum of the assessed value of the taxable property of the municipality, unless authorized by a two-thirds majority of the qualified electors thereof, voting at an election held for that purpose, but in no case shall the amount exceed ten per centum of the assessed value. Except that the amount that may be issued by cities having 10,000 or more inhabitants for

the purpose of improving or paving streets or sidewalks, or constructing or otherwise acquiring water works, gas or electric plants, may exceed ten per centum, but in no case to exceed fifteen per centum of the assessed value, which shall be submitted to an election as above. But the limit on the amount shall not apply to bonds or other obligations, issued for liquidation or to raise funds to liquidate any indebtedness when this Act becomes operative, or to bonds, the proceeds of which have been invested in enterprises producing or saving sufficient revenue over and above their operating expenses to pay the interest on these bonds.

Sec. 2. That whenever bonds shall be issued for the construction or purchase of water works, gas or electric plants, the corporate authorities of the city or town so issuing them may provide by ordinance, resolution, contract or otherwise, that the said bonds shall be secured by pledge of the revenue of the said water works, gas or electric lighting plants to be constructed or purchased, with the proceeds thereof.

Sec. 3. That Section 3415, of the Code of 1906, and An Act to amend Section 3014, Code of 1892, to authorize cities of ten thousand or more inhabitants, to issue bonds for the purpose of improving or paving streets, approved April 13, 1906; and also An Act entitled 'An Act to amend Section 3415 of the Mississippi Code of 1906, as to bond issues of municipalities,' approved March 20, 1908, be, and the same are hereby repealed; provided, however, that this Act shall in no way affect the validity of any bonds which may heretofore have been authorized at an election held under any existing law whether the bonds so authorized have been actually issued or not, and shall not affect or repeal any private or local laws now in force and effect, authorizing the issuance of bonds for any purpose.

Sec. 4. That this Act shall take effect and be in force from and after the date of its passage.

Approved April 5, 1910.

FILED.

OCT 13 1913

JAMES H. MCKENNEY,

CLERK.

United States Supreme Court.

OCTOBER TERM, 1913.

No. 546.

MAYOR AND ALDERMEN OF THE CITY OF
VICKSBURG,

Appellants,

against

W. A. HENSON, Receiver of the Vicksburg Waterworks
Company, and LELIA BOYKIN,

Appellees.

BRIEF IN BEHALF OF APPELLEES ON THE MERITS.

*Appeal From the United States Circuit Court of Appeals
for the Fifth Circuit.*

EDGAR H. FARRAR,
J. C. BRYSON,
JOSEPH HIRSH,
RICHARD F. GOLDSBOROUGH,
Solicitors and Counsel for Appellees.

SUBJECT INDEX

	PAGE.
Statement of the Case	1 to 15
Pleadings and Proof in Present Suit (<i>No. 119</i>) to enjoin issuance of bonds for purpose of constructing waterworks plant in violation of Vicksburg Waterworks Company's franchise heretofore adjudged exclusive in <i>former</i> suit (<i>No. 41</i>) <i>Vicksburg Waterworks Co. vs. Vicksburg</i> , 185 U. S. 65; 202 U. S. 453 (See: " <i>Appellee's Brief In Support of Motion to Dismiss Appeal</i> " at pp. 1 to 15, filed herein in this Court, October Term, 1913	1
The Three Questions Before This Court	2
The Facts in respect to the complainant-appellee's franchise	2 to 4
The Franchise (<i>Rec.</i> pp. 98-105) (Ex. B. in former suit No. 41; and same franchise but marked Ex. A in present suit (<i>No. 119</i>)	3
Steps Leading Up to Former Suit by Waterworks Company against City (<i>No. 41</i>) to protect its franchise	4 to 5
The Pleadings and Proof in Former Suit (<i>No. 41</i>) .	5 to 13
The Franchise Pleaded in Full as Ex. "B" to bill of complaint in <i>former</i> suit (<i>No. 41</i>) ...3; bottom of 5	

	PAGE.
The Same Franchise pleaded in full as Ex. "A" to Sup. and Amended Bill in the present suit (No. 119)	3
Prayer of Sup. & Am'd Bill in <i>former</i> suit (No. 41) for injunction against City's building waterworks for competitive purposes.....	8
Separate Specific Prayer of Sup. & Am'd Bill in <i>former</i> suit (No. 1) against City's building waterworks during franchise for any purpose.	8
Prayers of Bills in Present Suit (No. 119) <i>See</i> pp. 6-7 and 11 of " <i>Brief in Support of Motion to Dismiss</i> "	1
Answer (a composite <i>demurrer</i> , plea and answer) in <i>former</i> suit (No. 41)	8 to 12
Answer in present suit (No. 119) <i>See</i> : pages 7-8 and 11 of " <i>Brief in Support of Motion to Dismiss</i> "	1
Final Decree , May 18, 1904, (Rec. 46) in <i>former</i> suit (No. 41)	13 to 14
Alleged Final Decree , Feb. 4th, 1913, (Rec. 205) in <i>present</i> suit (No. 119) <i>See</i> : pages 13-14 of " <i>Brief in Support of Motion to Dismiss</i> ".	1
Pertinent Assignments of Error to this Court on direct appeal in <i>former</i> suit (No. 41) from said final decree which enjoined the City from issuing bonds to construct waterworks, and from constructing same, during the franchise.	14 to 15

Assignments of Error to this Court on appeal from an affirmance in the <i>present</i> suit (No. 119) by the Circuit Court of Appeals, Fifth Circuit, of said alleged final decree of the Circuit Court, which enjoined the issuance of bonds by the City to construct waterworks, and also enjoined the construction of the same, during the franchise. (See: page 14 of " <i>Brief in Support of Motion to Dismiss</i> ").....	1
Opinion of This Court reversing denial of jurisdiction in <i>former</i> suit (No. 41) between same parties (185 U. S. 65)	5, 24-25
Opinion of This Court affirming said decree in favor of Waterworks Company in <i>former</i> suit (No. 41) between same parties (202 U. S. 453)	15, 27-35, 51 62, 65, 68
Opinion of District Court for Southern District of Mississippi (Rec. 206) in favor of <i>Receiver</i> of Waterworks Co. and <i>Intervenor Boykin</i> in present suit (No. 119) (See: p. 13 of " <i>Brief In Support of Motion to Dismiss Appeal</i> ")....	1
Opinion of Circuit Court of Appeals for the Fifth Circuit (Rec. 227) affirming the District Court in present suit (No. 119) (See: p. 14 of " <i>Brief In Support of Motion to Dismiss Appeal</i> ")....	1
The Facts Upon Which the City's Claim of Estoppel is Based in the present suit No. 119.....	15
Opinion of This Court in 206 U. S. 496 which was another suit than No. 41 and the present suit No. 119 although between same parties.	

It related to the effect upon the *rate clause* a different clause than that construed in No. 41 and herein in the Waterworks Co.'s franchise, of an *Act of the Mississippi Legislature* passed *after* the affirmance by this Court (202 U. S. 253) of the decree in suit (No. 41) and before the institution of the present suit (No. 119) ... 52 to 55

Argument 16 to 79

I.

Res Adjudicata 16 to 59

Synopsis of the applicable principles of *res adjudicata* 16 to 22

General Discussion 22 to 36

Specific points discussed 36 to 59

(a) Relative to legal effect of pleading franchise in full in former suit (No. 41) 36 to 38

(b) Against splitting demands or defences .. 38 to 42

(c) The defendant City did join issue by demurrer in its answer in the former suit (No. 41) upon the question of its right under the franchise to build waterworks during the franchise. But, *assuming that it did not do so*, it is *none the less concluded* by the former judgment (No. 41) 42

PAGE.

- (d) If the decree in the former suit (No. 41) upon the issue as to the City's right to build for any purpose during the franchise was wrong, it was mere error, and is not subject to collateral attack. 43 to 46
- (e) Distinguishing cases cited for the City. . 46 to 56
 Answering City's view of 202 U. S. 453. 51 to 52
 Answering City's theory about 206 U. S. 496 52 to 55
- (f) Answering the argument for the City that neither the specific nor the general prayers in the bills in the former suit (No. 41) are sufficient to justify the decree, because, say counsel for the City, the specific prayer that the city be prohibited from constructing works of its own during the franchise for any purpose, is not supported by a corresponding averment in the body of the bills other than the setting forth therein at length of the franchise as an exhibit thereto, together with allegations of the City's attempt to violate the obligations of the franchise. 56 to 59

"First." The rule invoked that the averments in the body of the bills must be broad enough to sustain the specific prayer that the city be enjoined from building and the specific finding to that effect in the decree is applicable only to averments of fact. A special averment such as that alleged to be

missing would be a conclusion of law; and one that has been put in issue by the answer which contains an inferentially specific as well as general demurrer. 56 to 57

"*Second.*" If there was any deficiency in the bills in this regard it is cured by various allegations in the answer, as well as by demurrer in the answer 57 to 59

II.

THE QUESTION OF CONSTRUCTION OF THE FRANCHISE.

If the City be *not* concluded by the decree in the former suit (No. 41); **it is concluded by the terms of the Waterworks Company's Franchise**, which was construed therein, and adjudged therein (202 U. S. 253) to be exclusive in respect to the entire clause, namely,—
"erecting, maintaining and operating" 60 to 73

III.

AS TO ESTOPPEL.

In answer to the contention for the City that the decree affirmed by the Circuit Court of Appeals in this suit (No. 119) is erroneous, because, say counsel for the city the Waterworks Company was estopped by its alleged silence, when the

PAGE.

City laid some water mains here and there in streets about to be paved before this suit was started,—in 1910 and 1911.....73 to 78

IV.

THE LEGALITY OF THE BOND ISSUE is NOT before this Court on this appeal; and hence is not argued78 to 79

V.

Submitting that the judgment below should be affirmed with costs 79

LIST OF CITATIONS.

(Cases, Statutes and Text-books.)

Act of Legislature of State of Mississippi of March 9, 1900	p. 4
Act of Legislature of State of Mississippi of 1886.	p. 60
<i>American Bell Tel. Co. et al. vs. Southern Tel. Co. et al.</i> , 34 Federal Rep. 803.....	pp. 37, 38
<i>Aurora vs. West</i> , 7 Wall. 82 (19 L. Ed. 42)	p. 42
<i>American Express Co. vs. Mullens</i> , 212 U. S. 311 (53 L. Ed. 525)	p. 45
<i>Beloit vs. Martin</i> , 7 Wall. 619.....	p. 39

<i>Bloomfield vs. Charter Oak National Bank</i> 121 U. S. 121 (30 L. Ed. 923)	p. 74
<i>Brant vs. Virginia Coal & Iron Co.</i> , 3 Otto 326 (23 L. Ed. 927)	p. 74
<i>Cromwell vs. County of Sac.</i> , 94 U. S. 351 (24 L. Ed. 195)	p. 42
<i>Cavender vs. Cavender</i> , 114 N. Y. 464	p. 59
<i>Case vs. Bouregard</i> , 101 U. S. 688	p. 47
<i>Dimock vs. Revere Copper Co.</i> , 117 U. S. 559 (29 L. Ed. 994)	p. 39
<i>El Paso Case</i> , 152 U. S. 152	pp. 36, 63, 64 65
Encyclopedia of U. S. Supreme Court Reports, Vol. 10, pp. 729 to 798 <i>Res Adjudicata</i>	p. 16
<i>Id.</i> p. 757 and cases in Note 17	p. 17
<i>Id.</i> p. 761, Notes 32 and 33	p. 17
<i>Id.</i> pp. 757 to 759 and cases in Notes 18 to 21	p. 18
<i>Id.</i> p. 760, Notes 26 and 27	p. 18
<i>Id.</i> p. 760, Note 28 and cases cited	p. 18
<i>Id.</i> p. 761 and case cited in Note 33	p. 18
<i>Id.</i> p. 761 and case in Note 32	p. 18
<i>Id.</i> p. 762 Note 42	p. 18
<i>Id.</i> p. 738, Note 28	p. 19
<i>Id.</i> pp. 763 to 767 and cases in Notes 49 to 53	p. 19
<i>Id.</i> pp. 767 and 768 and Notes 56 and 57	p. 20
<i>Id.</i> pp. 768 and 769 and Note 58	p. 20
<i>Id.</i> p. 769, Note 59	p. 20
<i>Id.</i> p. 771, Note 76	p. 20
<i>Id.</i> p. 736	p. 21
<i>Id.</i> p. 738	p. 21
<i>Id.</i> p. 736, Note 23	p. 21

<i>Id.</i> p. 737, Note 24.....	p. 21
<i>Id.</i> p. 737, Notes 25 to 27.....	p. 22
Ency. P. & P., Vol. 3, pp. 362 and 363.....	p. 38
<i>Id.</i> Vol. 8 p. 740.....	p. 38
<i>Electrolibration Co. vs. Jackson</i> , 52 Fed. Rep. 773.....	p. 38
<i>Fayerweather vs. Ritch</i> , 195 U. S. 276.....	pp. 42, 43, 59
<i>Hine vs. Morse</i> , 218 U. S. 493.....	p. 43, 44
<i>Miller vs. Wayne International Bldg. Assn.</i> , 32 Ind. App. 480 (70 N. E. 180).....	p. 38
<i>Meridian Waterworks vs. Meridian</i> , 85 Miss. 515..	p. 75
<i>Missouri vs. Illinois, etc., Disct.</i> , 180 U. S. 208....	p. 76
<i>Reynolds vs. Stockton</i> , 140 U. S. 254.....	pp. 48, 51
<i>Samuel Cupples Envelope Co. vs. Lackner</i> , 99 N. Y. App. Div. 231 (90 N. Y. Supp. 954).....	p. 38
<i>Southern Pacific Co. vs. United States</i> , 168 U. S. 1 (42 L. Ed. 355).....	p. 41
<i>Sioux Falls vs. Farmers' Loan & Trust Co.</i> , 69 C. C. A. Rep. 383.....	pp. 63, 66, 67
<i>Sturm vs. Boker</i> , 150 U. S. 112.....	p. 73
<i>Texas vs. White et al.</i> 22 Wall., 157 (22 L. Ed. 819)	p. 38
<i>Tioga Railroad Co. vs. Blossburg and Corning Rail- road Company</i> , 20 Wall. 137 (22 L. Ed. 331) ..	p. 42
<i>Vicksburg Waterworks Co. vs. Vicksburg</i> , 185 U. S. 65	pp. 5, 24, 25
<i>Vicksburg vs. Waterworks Co.</i> , 202 U. S. 453....	pp. 15, 27, 29, 51, 62, 63, 65, 68
<i>Vicksburg vs. Vicksburg Waterworks Co.</i> , 206 U. S. 496	pp. 52, 55
<i>Walla Walla vs. Walla Walla Water Co.</i> , 171 U. S. 1 pp. 30, 55, 65, 66	
<i>Windsor vs. McVeigh</i> , 93 U. S. 274.....	p. 59

United States Supreme Court.

OCTOBER TERM, 1913.

No. 546.

MAYOR AND ALDERMEN OF THE CITY OF
VICKSBURG,

Defendants—Appellants,

against

W. A. HENSON, Receiver of the Vicksburg Waterworks
Company, and LELIA BOYKIN,

Complainants—Appellees.

BRIEF IN BEHALF OF APPELLEES ON THE MERITS.

*Appeal From the United States Circuit Court of Appeals
for the Fifth Circuit.*

STATEMENT OF THE CASE.

A detailed analysis of the pleadings is contained in the brief on the motion to dismiss the appeal. It is unnec-

cessary to repeat that analysis here, as nothing is now left in this case on the merits except the three questions arising out of the claims of the receiver in respect to the Bullock franchise. Those three questions are:

FIRST. Is the decree entered in what is known in the record as Case No. 41, *res adjudicata* of the issues in this case?

SECOND. If that decree is not *res adjudicata* on the question of the right of the city to erect and maintain, prior to November 18, 1916, in the City of Vicksburg, a waterworks system, and to enter upon and use the streets, alleys and public places of said city to lay mains and pipes and construct hydrants for the purpose of supplying water for public and private purposes after the company's franchise shall expire on November 18, 1916, then is the city so precluded by the terms of the exclusive franchise granted the company (complainant and appellee)?

THIRD. Is the complainant (the company) estopped from urging these claims because it made no objection on these grounds to the city's action in 1910 and 1911 in laying some scattered mains, at a cost of about \$30,000, in streets about to be paved?

In order to make clear these contentions it is necessary to state in detail the facts in respect to the franchise owned by complainant, the litigation between complainant and defendant in respect to said franchise, and the acts of complainant in regard to the laying of the mains by the city on certain streets.

On November 18, 1886, the City of Vicksburg, under due legislative authority, and after receiving competitive

bids, granted to Samuel R. Bullock & Co., their successors and assigns,

"the EXCLUSIVE right and privilege * * * for the period of thirty years * * * of erecting, maintaining and operating a system of waterworks" (in accordance with the terms and provisions of the ordinance) "and of using the streets, alleys, public squares and all other public places within the corporate limits of the City of Vicksburg, as they now exist or may hereafter be extended, and within such other territory, as may now or hereafter be under its jurisdiction, for the purpose of laying pipes, mains and other conduits, and erecting hydrants and other apparatus for conducting and furnishing an adequate supply of good, wholesome water to the City of Vicksburg and to its inhabitants for public and private use, and for making repairs and extensions to said system from time to time during the period in which this ordinance shall be in force."

See *Record*, pp. 3-4, where above is quoted in present Bill (No. 119); and *Rec.*, top of p. 50, where the franchise is made Ex. A to amended bill in *present* suit (No. 119); *Rec.*, p. 107, where above is incorporated in Bill in No. 41 (the *former* suit) as *Exhibit B*. (*Rec.*, pp. 98-105, containing entire franchise as Ex. B in No. 41 and Ex. A in No. 119.)

The ordinance specified the most elaborate details for the construction of the plant, and for its test and acceptance by the city.

The city reserved to herself the right and privilege of buying this system of waterworks at the expiration of each period of ten years during the life of the ordinance, on giv-

ing a year's notice, and the contract provided for a method of determining the value to be paid by the city—i. e., the city and the grantee each to appoint a hydraulic engineer, and these two appointees name a third hydraulic engineer, the three constituting a board to fix the value to be paid by the city in cash within sixty days from the date of the board's award.

The city rented from the grantee for thirty years eighty double-nozzle frost-proof hydrants at sixty-five dollars per annum, and, after the first year of operation, rented ten more such hydrants for the balance of the franchise.

Free water was to be furnished for named specific and limited purposes and designated public institutions.

The grantee was to extend its mains on demand upon certain conditions, and was to regulate the prices to be paid for water by private consumers not to exceed designated limits.

The works were built, tested and accepted by the city, and for fourteen years there seems to have been no serious friction between the parties.

The property and franchises by various changes in ownership became vested in the Vicksburg Waterworks Company.

In *March, 1900*, the Legislature of Mississippi passed an act entitled "*An Act to authorize the Mayor and Aldermen of the City of Vicksburg to issue bonds to the amount of \$375,000 to purchase, or construct, equip and maintain a waterworks system, etc.*"

Thereafter the City of Vicksburg acted as follows:

FIRST. Held an election on July 3, 1900, in pursuance of said act of the Legislature, at which it was voted that said city should issue its bonds in the sum of \$150,000 to buy or construct waterworks for said city.

SECOND. Passed an ordinance on November 7, 1900, instructing the Mayor to notify the Waterworks Company that the city denies any liability upon any contract for the use of the waterworks hydrants; that from and after August, 1900, the city will pay reasonable compensation for the use of said hydrants; and that the City Attorney take such action as shall be necessary to determine the rights of the city in the premises.

THIRD. Instituted a suit in the Chancery Court of Warren County seeking to annul and destroy said Bullock franchise, averring that the city no longer recognized any liabilities under said contract, and that said contract no longer exists.

Thereupon, in February, 1901, the Vicksburg Waterworks Company filed its bill in the Circuit Court of the United States, being No. 41 of its docket, against the City of Vicksburg to protect its franchise and contract from the acts and doings of the city's authorities, claiming the protection of the contract clause of the Constitution of the United States. This bill was dismissed for want of jurisdiction, and the cause came directly to this court, where the decree below denying jurisdiction was reversed, and the cause remanded.

See *Vicksburg Waterworks Co. vs. Vicksburg*, 185 U. S., p. 65, where the case is stated in full.

Looking at the pleadings more in detail, it appears that in the original (*Rec.*, p. 106) and *amended and supplemental* bill (*Rec.*, p. 24), the complainant set out in full its contract and franchise, and made the Bullock grant (*Rec.*, p. 107) an exhibit (*Ex. B. Rec.*, pp. 98-105) to its bill, and re-

averred its reliance thereupon in its *amended and supplemental bill* (*Rec.*, at top p. 26); averred its compliance therewith (*Rec.*, p. 108 and pp. 109-110) and the acquiescence therein of the defendant for fourteen years (*Rec.*, p. 108 and p. 110); averred a conspiracy by the Mayor and Aldermen to injure and destroy the credit and business of complainant (par. 13 at pp. 110-111 of *Rec.*); averred that the act of the Legislature of 1900 (*Rec.*, p. 111 and p. 24) and the ordinances (par. 16, *Rec.*, p. 112 and pp. 24 and 26) of the city alleged to have been passed in pursuance thereof were in violation of the Constitution of the United States, inasmuch as they impaired the obligation of the Bullock franchise and contract because by said act the Legislature assumed to annul and abrogate the Bullock franchise and contract in this, that by reason of said ordinance and contract the city has no right within the period of thirty years to engage in the business of supplying water to the inhabitants of said city in competition with said Bullock and Co., or their assigns, notwithstanding which said act authorizes and permits said city to construct and maintain waterworks for said purpose, if unable to buy the waterworks at the arbitrary price fixed by the legislative act, * * * and said ordinance (*Rec.*, p. 112, par. 16 and p. 24 and 26), in pursuance thereof was passed and an election authorizing an issue of bonds thereunder to purchase or construct waterworks was held (*Rec.*, p. 111 and pp. 24-25), etc.—all of which acts and doings on the part of said city and the Legislature of Mississippi, impaired the credit of the Vicksburg Waterworks Company and depreciated the value of its property, and tend to disable it from carrying on its business and to coerce it to sell its property for such arbitrary and inadequate price, and cast a cloud upon its title, franchise and rights (*Rec.*, pp. 111-112);

averred, as a conclusion of law, that by said Bullock franchise the city was precluded from issuing and selling bonds—

*“Therefore, said City * * * is precluded from issuing and selling bonds to build, construct, maintain and operate a waterworks of its own in competition with complainant against its own contract.”*

(Rec., p. 26.)

There was another and independent section in the bill, being Section 25 (Rec., pp. 114, 115), which averred that this act was unconstitutional because the Legislature of the State had by said act passed a law “impairing the obligation of a contract,” the same having been passed “while said contract and ordinance” (meaning the Bullock contract and ordinance) “was still in force, and the condition thereof being performed by both parties without complaint from either.”

This is a broad and unlimited attack on the statute as being in contravention of the contract clause of the Constitution of the United States, setting up the contract and ordinance on the one side and the statute on the other, and, therefore, calling for an examination of the whole contract from every aspect in which it was or could be contravened by the statute, or any acts and doings of the City of Vicksburg under its provisions or by virtue of its authority.

The prayer of the bill and supplemental bill was:

FIRST. For general relief.

SECOND. That defendant be enjoined perpetually from assuming to abrogate and take away the franchise and contract rights of complainant, and from endeavoring to dis-

able complainant from carrying on its business, and to destroy its credit and the value of its property, and coerce said complainant to sell its waterworks to defendant for an inadequate price, and from otherwise carrying on the unlawful conspiracy entered into by it, and from doing any other illegal and unlawful act in furtherance of said unlawful conspiracy.

THIRD. That the act of the Legislature of Mississippi, adopted March 9, 1900, and the resolution and ordinance adopted and passed by the city on November 7, 1900, be decreed to impair the obligations of the contract between Bullock & Company and the city, and to cast a cloud upon the title, franchise and rights of complainant, and to be invalid and of no effect as against your orator. (Rec., p. 119.)

FOURTH. That defendant be enjoined from issuing and selling bonds for the purpose of building and constructing waterworks of its own in competition with your orator.

"And in addition thereto that the defendant be precluded and restrained and enjoined from constructing waterworks of its own in said city until the expiration of your orator's contract."

Rec., p. 26.

Thus, in the amended and supplemental bill (Rec., p. 26) was the city put upon notice that a decree was asked, giving *the specific relief* of an injunction *against the construction* of waterworks by it *for any and all purposes*, "in addition" to an injunction against the construction for the sole purpose of competition.

The defendant by its answer (Rec., p. 27) admitted the passage of the act and ordinances complained of; admitted the execution of the Bullock contract in the words and

figures set forth; averred that the exclusive privilege contained in said contract was unauthorized, illegal and void; denied the validity of the chain of title by which the Vicksburg Waterworks Company claimed to be the owner thereof; denied that the complainant had complied with the terms of said contract; denied that the question of liability of defendant on the Bullock contract depended on the legislative act of 1900, and averred that the ordinance denying liability on the contract was not adopted in pursuance of said act, and that no liability existed on said contract for many reasons set up in the answer, irrespective of the act; denied that the resolution complained of was adopted or that the suit was instituted in the Chancery Court of Warren County in pursuance of the act of the Legislature, or to injure the complainant's property, or to coerce it to sell its works at an inadequate price; averred that the legislative act "merely confers authority upon respondents, which is optional with them, but is not mandatory or obligatory upon them, to take action"; that the bill does not charge that said city intends to build any works, or has taken any action for that purpose, and, in fact, that the wisdom and policy of building any works cannot be considered and determined until it first be ascertained whether they are bound to complainant by said contract; that before the question of building a sewerage system and waterworks can be entertained by them they deem that it is proper that there should be first settled their liability, if any, under said contract; that they consider it is their duty as public servants to test said question, not only because of the onerous terms of said contract, but also because the public welfare requires that said question be settled, for they might justly conclude that it would be unwise to build a system of waterworks in case it should

be decided that they are bound by said contract, though they may have the legal right to build,

"so that they say that said resolution was not adopted in pursuance of said act of the Legislature, or by virtue of it, but solely to test said question, as an official duty which they owe, first, that they should not acknowledge a burdensome liability upon the taxpayers which they do not believe to exist, and, second, that they might act advisedly in determining what action, if any, should be taken by them in the exercise of the authority to build or buy a waterworks plant."

Rec., pp. 38, 39.

For present purposes, the gist of this confusing "answer" (which is, in content, a composite pleading containing a demurrer and plea as well as an answer) is to be found in the defenses putting in issue *both* of the following separate and separately stated specific demands for interpretation of the Bullock contract contained in the bills: (1) That the interpretation be such that the city be enjoined from "building and constructing waterworks of its own in competition" * * * (2) that the interpretation be such that the city, "*in addition*," be enjoined from "constructing waterworks of its own" during the franchise.

As already stated, the Bullock contract was pleaded in full in the bills. The above quoted specific conclusions of law therefrom, which the Court was asked to draw, were put in issue:

FIRST...*By demurrer* contained in the answer. (See last paragraph on page 44 of record.)

"Respondents further answering, say that the matters and things contained in complainant's amend-

ed and supplemental bill are irrelevant, immaterial and afford no ground for relief to the complainant and their legal sufficiency is now submitted to the Court and judgment thereof is craved, *as if formally demurred to.*"

Quotation from answer in No. 41 at page 44 of the Record. (Our ital's.)

SECOND. By a general denial contained therein. (See last three lines on page 44 of the record.)

"and respondents further answering say: That there does not appear any ground for the equitable relief sought by the complainant by reason of the matters and things averred in its original and amended bills."

Quotation from answer in No. 41; Rec., p. 44.

THIRD. By an inferentially specific denial. (Rec., p. 29, from and including the third line from the top of that page to the end of the quotation on that page from the Bullock contract.)

"These respondents *admit* that there is a provision in the contract made between the city and Samuel R. Bullock & Co., whereby the exclusive right is given to Samuel R. Bullock & Co., their successors and assigns for the period of thirty (30) years to maintain a system of waterworks and to supply said city and its inhabitants with water.

"That said provision is in words as follows: 'That in consideration of the public benefit to be derived therefrom, the exclusive right and privilege is hereby granted for the period of thirty (30) years from the time that this ordinance takes effect, into Samuel R. Bullock & Co., their associates, successors and assigns of erecting, maintaining and operating a system of waterworks in accordance with the terms

and provisions of this ordinance, and of using the streets, alleys, public squares and all other public places within the corporate limits of the City of Vicksburg, Mississippi, as they now exist or may hereafter be extended and within such other territory as may now or hereafter be under its jurisdiction, for the purpose of laying pipes, mains and other conduits and erecting hydrants and other apparatus for conducting and furnishing an adequate supply of good wholesome water to the City of Vicksburg, Mississippi, and to its inhabitants for public and private use and for making repairs and extensions to said systems from time to time during the period in which this ordinance shall be in force."

Quotation from answer in No. 41; Rec. p. 29.
(Our *itals.*)

The inference that this is in substance a specific denial is strengthened (if anything to render the inference more certain be deemed essential) by considering this language of the answer at page 29, in conjunction with the general denial and demurrer above referred to (Rec., p. 44), and with the averments therein from the eighth line from the bottom of page 38 of the record to and inclusive of the first seven lines from the top of page 39. (See page — below.)

"In fact respondents say that the wisdom and policy of *building* any *works* cannot be considered and determined until it be first ascertained whether they are bound to complainant by said contract.

"That before the question of building a sewerage system and waterworks can be entertained by them, they deem that it is proper that there should first be settled their liability, if any, under said contract; they consider that it is their duty as public servants to test said question not only because of the

onerous terms of said contract, but also because the public welfare requires that said question be settled, for they might justly conclude that it would be unwise to build a system of waterworks in case it should be decided that they are bound by said contract, though they may have the legal right to build."

Quotation from answer in No. 41 at pages 38-39 of Record. (Our italics.)

On these issues the parties went to trial, and after hearing the following final **decree** was entered (Rec., p. 46) :

"FIRST. That the defendant * * * be, and is hereby, perpetually enjoined from abrogating or taking away, or from assuming to abrogate or take away, the franchises or contract rights of complainant under and by virtue of the ordinance, franchise or contract of said defendant entitled; * * * and said ordinance, contract and franchise being specifically and accurately set out in words and figures in the pleadings, which ordinance, contract and franchise was acquired by, and is the sole and exclusive property of, said complainant.

"SECOND. That said ordinance, contract and franchise be, and is hereby, *declared and held to be in all and every respect legal, valid and enforceable and binding upon said defendant, and said defendant is hereby perpetually enjoined from infringing, ignoring, rescinding or denying liability under said ordinance, contract and franchise in any of its parts,* or from in any manner disturbing or interfering with the rights, privileges and benefits acquired by defendant thereunder.

"THIRD. That said defendant be, and is hereby, directed to rescind its resolution and ordinance adopted the 7th day of November, 1900. * * *

"FOURTH. That the said defendant refrain from in any manner accepting the benefits of or proceeding under the act of the Legislature of the State of Mississippi, approved March 9, 1900, and from *issuing bonds under and by virtue of said act, or any other act or ordinance, for the purpose of erecting waterworks of its own, during the period prescribed in said ordinance and franchise.*

"FIFTH. That the said defendant **refrain from constructing waterworks of its own** until the expiration of the period prescribed in the said ordinance, contract and franchise dated 18th day of November, 1886."

The balance of the decree is immaterial to any issue in this case.

The defendant appealed directly from this decree to the Supreme Court of the United States, and assigned as error the following (p. 122), of which only the fifth and sixth assignments are pertinent to this case:

"V.

"The said Court erred in rendering the final decree against respondent because said decree is contrary to the law and the facts as stated in the pleadings and proof before said Court.

"VI.

"The said Court erred in perpetuating by its final decree the injunction against respondent, restraining it from erecting a water plant of its own."

This appeal was heard in *this court*, and the decree of the lower Court, as covered by these assignments, was specifically affirmed (see *Vicksburg vs. Waterworks Company*, 202 U. S. 453 *et seq.*), the Court saying (p. 472) :

"We find no error in the decree of the Circuit Court enforcing the contract rights of the complainant and enjoining the city from erecting its own works during the term of the contract."

In regard to the facts on which the appellee's *claim of estoppel* is based, there is nothing in this record except what is found on pages 195 and 196 (being the testimony of Crumpler) and on pages 202, 203 and 204.

ARGUMENT

I.

*On the proposition that the litigation had between the parties in Record No. 41 and the decree therein entered by the Circuit Court, and specifically affirmed by the Supreme Court of the United States, is **res adjudicata** of the issues involved in this cause.*

SYNOPSIS OF THE APPLICABLE PRINCIPLES OF RES ADJUDICATA.

Before entering upon the argument on this proposition, it may be of service to summarize the principles depended upon.

Cases applicable will be discussed later in detail. (See pages 36-59 *below*.)

Synopsis of Principles of *res adjudicata* presently applicable, drawn exclusively from the Federal jurisprudence as outlined in Vol. 10, "*Encyclopedia of U. S. Supreme Court Reports*," pages 729 to 798, under the heading "*Res Adjudicata*."

It will be recalled that the text of this work purports to be in the very language used in the opinion of this Court.

"There is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties on a different claim or demand."

Id., p. 757, and cases in note 17.

(A)

"WHERE SECOND ACTION ON SAME CLAIM OR DEMAND." (*Id.*, p. 757.) Or, where the "Defense" is the same. (*Id.*, p. 761, notes 32 and 33.)

"GENERAL RULE—a. . . Rule Stated.—It is well settled that a valid final judgment or decree, upon the merits, constitutes an absolute bar to a subsequent action or suit between the same parties upon the same claim or demand. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Except in special cases, the plea of *res adjudicata* applies not only to points upon which the Court was actually required to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. Such plea

applies to every objection urged in a second suit, when the same objection was open to the party within the legitimate scope of the pleadings in the former suit, and might have been presented in it. The estoppel is not confined to the judgment, but extends to all facts involved in it, as necessary steps or the groundwork upon which it must have been founded."

Id., pages 757 to 759, and cases in notes 18 to 21.

"So, also, the judgment in an action to quiet title is conclusive of the title, whether adverse to the plaintiff in the action or to the defendant. In other words, it determines the merits of the plaintiff's title as well as that of defendant."

Id., p. 760, notes 26, 27.

"It is a well-established principle that a party seeking to enforce a claim, legal or equitable, must present to the Court, either by the pleadings or the proofs, or both, all the grounds upon which he expects a judgment in his favor, and is not at liberty to split up his demand and prosecute by piecemeal."

Id., p. 760, note 28, and cases cited.

"A party may *not* split up defenses."

Id., p. 761, and case cited in note 33.

"The judgment in a former action for the same cause is conclusive not only as to the defenses which were presented in such action, but also as to all defenses which might have been but were not presented."

Id., p. 761, and cases in note 32.

"When an action at law is brought upon a contract, the defendant denying its obligation, * * * must present his defense for consideration."

Id., p. 762, note 42.

(B)

"IDENTITY OF SUBJECT MATTER.

"While identity of subject-matter would usually seem to be implied from identity of cause of action, yet it has been expressly held, in at least one case, that where the parties are the same the legal effect of the former judgment as a bar is not impaired, because the subject-matter of the second suit is different, provided the second suit involves the same title, and depends upon the same question."

Id., p. 738, note 28.

(C)

"WHERE SECOND ACTION ON DIFFERENT CLAIM OR DEMAND.

"Necessity That Precise Question Shall Have Been Determined.—a. *General Rule.*—When the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action. It must appear either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit."

Id., pages 763 to 767, and cases in notes 49 to 53.

"EXCEPTION TO ABOVE GENERAL RULE.

"Matters Necessarily Involved.—Though the general rule is as above stated, yet it has often been held that the judgment in a former suit is conclusive as to all matters which were necessarily involved in such suit, so that the decision of the Court could not have been rendered in that suit without determining it."

Id., pp. 767, 768, and notes 56 and 57.

"EXTENT AND LIMITATION OF DOCTRINE.

"a. Judgment an Estoppel as to All Material Issues Decided—(1) General Rule.—It is well established that a valid final judgment on the merits rendered in a former suit is conclusive in any other suit between the same parties or their privies, as to all material matters put in issue and determined in the former suit."

Id., pp. 768, 769, and note 58.

Even although claims or defenses be *not* the same, it is laid down that the above quoted principle

"has been applied to adjudications as to the construction and validity of contracts, etc."

Id., p. 769, note 59.

So, still, although the claims in the two actions be not the same,

"if a former *decree in equity* covered and concluded the matters in difference, regarding the defense set up in a subsequent action, such decree must be treated as conclusive."

Id., p. 771, note 76.

(D)

A classification made in the text of *Id.* (Ency. of U. S. Sup. Court Reports) similar to that between causes of action in which the claims or demands or defenses are the same and those in which different, is that between the necessary "identity of causes of action, subject-matter and issues" * * * "where judgment or decree relied on as a bar" (*Id.*, p. 736), and "where judgment or decree relied on merely as estoppel." (*Id.*, p. 738.)

"General Rule. * * * In order that a judgment or decree may operate as a bar to a subsequent action or suit, and conclude parties and privies not only as to any matter offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose, there must be identity of the cause of action; the point of controversy must be the same in both cases."

Id., p. 736, note 23.

"PRESUMPTION.

"Where the parties and the cause of action are the same, the *prima facie* presumption is that the questions presented for decision were the same, unless it appears that the merits of the controversy were not involved in the issue."

Id., p. 737, note 24.

"TESTS AS TO IDENTITY.

"(a) *Sufficiency of Same Evidence to Sustain Both Actions.*—One criterion for trying whether the matters or cause of action be the same as in the former suit is that the same evidence will sustain both actions.

"(b) *Difference in Theory, Form or Measure of Relief Sought Immaterial.*—It would seem from the decisions that, in general, a judgment is a bar to a second attempt to reach the same result by a different *medium concludendi*.

"(c) *Identity of Relief Sought Not Sufficient Where Suits Rest Upon Different State of Facts.*—Where two suits, though seeking the same relief, rest upon a different state of facts, the adjudication in the one constitutes no bar to a recovery in the other." *Id.*, p. 737, notes 25 to 27.

The complainant in the two causes is the same, because the receiver of the Vicksburg waterworks is identical, as to right, with the company he represents. The defendant is the same. All that remains to be discussed is the question as to whether the issues now before the Court are the same in substance as those adjudged in the former case. *Or*, in the alternative, as indicated in the above "*Synopsis*" of the law either that there is identity of subject-matter although the claims, or *defenses*, be different; *or*, that the same question *including what was necessarily involved in it* (See p. 20 above) is asked to be passed upon now that was decided then, even if the claims or defences be different.

The issues in the former case were:

FIRST. Was the Bullock franchise valid?

The Court held that it was valid "*in all and every respect.*"

SECOND. Was the Bullock franchise exclusive, not only of third persons, but of the City of Vicksburg?

The Court held that it was exclusive ~~of both third persons and~~ of the City of Vicksburg.

THIRD. Did the City of Vicksburg have the right to erect a water plant of its own during the existence of the complainant's franchise?

The Court held that no such right existed, and enjoined the erection of such a plant during the existence of the franchise.

But the defendant contends that its right to erect such a plant during the existence of the franchise for the purpose of furnishing water in competition with complainant was alone in issue; that the purpose of said erection was the substance of the issue; and that, inasmuch as it now proposes to erect such plant during the existence of the franchise, not for the purpose of furnishing water during the existence of the franchise, but in order to have such plant ready to furnish water when the complainant's franchise shall have expired, its right so to do is not concluded by the decree in the previous litigation.

Any examination of the pleadings will show that the whole scope and validity of plaintiff's contract in regard to the erecting of a water plant during the life of the franchise was in issue.

(This is true, and sufficient, even if the third finding above stated) in the decree had not been based, as was the case (Infra pp. 10-13, and 56-57), upon a *wel'*

pleaded and specific issue of law whether the contract, properly interpreted, prohibited the City from building for any purpose whatsoever.)

The legislative act of March 9, 1900, attacked in the case, gave to the city power to issue bonds "to purchase or construct, equip and maintain a waterworks system." No time limit was fixed in this act. It was not mandatory upon the city to exercise the powers granted. It could use these powers just as well after the Bullock franchise had expired as before. No limitation was put on the purpose for which or the extent to which the city was to "construct, equip and maintain a waterworks system." The power granted could be used to construct, equip and maintain a waterworks system as well for the purpose of supplying water actively to the City of Vicksburg during the existence of the Bullock franchise, either in competition with that franchise or in supplement thereto, as for the purpose of having a plant ready to supply water after the Bullock franchise had expired.

That the power under the legislative act of March 9, 1900, could and might be used by the city without impairing the obligations of complainant's franchise was recognized both by this Court and by the final decree in case No. 41. In 185 U. S. 81 this Court said:

"As respects the act of March 9, 1900, it is contended by the complainant that it is unconstitutional for several reasons, chiefly because it places an arbitrary valuation on the property of the complainant, and because it purports to authorize the city to build

and operate waterworks of its own in derogation of the contract rights of the complainant.

"Whether the act of the Legislature of Mississippi is, in its terms, subject to these objections, or whether it may be regarded *as merely authorizing the city to proceed in such a manner as not to conflict with existing contract obligations*, we need not determine at this stage of the case, because we think that the ordinance of the city of November 7, 1900, whereby the Mayor was instructed to notify the waterworks company that the Mayor and Aldermen deny liability upon any contract for the use of the waterworks hydrants, and the subsequent action of the city in holding an election to authorize the issue of bonds to buy or construct waterworks of its own, and in refusing to pay the amount due and payable under the terms of the ordinance, do not present the mere case of a breach of a private contract, to be remedied by an action at law, but disclose an intention and attempt, by subsequent legislation of the city, to deprive the complainant of its rights under an existing contract."

In the final decree the city was enjoined (p. 47), not from issuing any bonds at all under the legislative act of March 9, 1900, but

"from issuing bonds under and by virtue of said act, or any other act or ordinance, for the purpose of erecting waterworks of its own during the period prescribed in said ordinance, contract and franchise."

The city at great length in her answer, as shown above, disclaimed that it intended doing, or that it had done, any act showing an intention "to construct, equip and maintain a waterworks system" until the validity of the Bullock

franchise had been determined, or that its acts complained of in the bill had been done under or because of said statute, and averred that it had only sought *to test the franchise*. (Rec., pp. 38, 39.) But note how the defendant now tries to shift its position in that case in a vain attempt to escape the plea of the thing adjudged. In its answer to the present case (Rec., pp. 12, 13) it says:

"Defendant avers that at the time the bill of complaint was filed in said cause by the Vicksburg Waterworks Company **it had denied all liability on a ccount of the franchise owned by said company,** and had announced its purpose to build a waterworks plant of its own to be immediately operated in competition with that of the Vicksburg Waterworks Company, and that the sole question presented by the pleadings in said cause was whether or not defendant had the right to compete **in this manner** with the Vicksburg Waterworks Company."

As shown above, this claim is incorrect, except as to the statement that it "*had denied all liability on account of the franchise.*" Having denied all liability on account of the franchise, and having set up in its pleadings in No. 41 that all of its acts were for the purpose of testing its liability under the franchise in respect to its right to erect a water plant during the existence of the Bullock franchise, its right to erect a water plant during the existence of the franchise for every object or purpose for which such a plant could be erected under the statute complained of, or under any other similar statute, was necessarily in issue, as the statute did not limit or define the purpose for which such plant was to be erected. That the parties and the Court so understood the issue is shown by the final decree (neces-

sarily submitted to and approved by the counsel for defendant), which enjoined the defendant "from issuing bonds under and by virtue of said act (of March 9, 1900), or any other act or ordinance, for the purpose of erecting waterworks of its own during the period prescribed in said ordinance and franchise" (Rec., p. 47); and, as if to make still more manifest what the Court meant, and to make the decree still more stringent and binding on this point, the decree proceeds to adjudge that

"the said defendant refrain from constructing waterworks of its own until the expiration of the period prescribed in said ordinance, contract and franchise, dated 18th day of November, 1886."

Rec., p. 47.

That the defendant fully understood and appreciated what the scope of the decree was, and what it was intended to be, appears not only by its assignment of error No. VI, to the effect that "the said Court erred in perpetuating by its final decree the injunction against respondent, restraining it from erecting a waterworks plant of its own," but also by the written argument made and filed in that case in the Supreme Court of the United States.

We quote from the brief of the City of Vicksburg in this court in the case reported in 202 U. S. 453:

"This sweeping injunction restrains the city from building waterworks *for any purpose* until the termination of the Bullock franchise, and from taking any action whatever under the law of March 9, 1900, with that end in view. This is necessarily a holding that the said act of March 9th, in so far as it authorized the city to build a waterworks plant, is unconstitutional as impairing the obligation of com-

plainant's contract. The sixth assignment of error brings the question before the Court as fully and as completely as possible. The allegation in complainant's bill that the statute was in contravention of the Constitution of the United States, and the denial of that by the defendant, and the decree by the lower Court sustaining the contention of complainant, fulfill all the conditions of the statute. The question was not decided on the first appeal because the opinion, by express terms, so declares. It remains, therefore, to be shown that it is a material issue in the case. As to which we contend that undoubtedly the city had the right under the Bullock contract to build a waterworks plant, as provided in the act of March 9, 1900, for the purpose of flushing sewers, even though it should be held by this Court that the Bullock franchise and contract in its entirety were valid and binding on the city. We think it is equally true, as a matter of law, that the city had a right to build and operate waterworks to supply itself with water for such fire hydrants as it might need in addition to the ninety called for in the Bullock contract, and to supply its public buildings and institutions and its public fountains as they might be increased in numbers. There is no provision in that contract or ordinance which requires the city to take or pay for water from Bullock & Company, except the stipulation for the rental of ninety fire hydrants. In the absence of such agreement, the city certainly had the right to supply itself and to build a plant for that purpose. If the city is to be denied such right under the Bullock contract, it is by implication, and implication alone, which this Court has repeatedly held would not be permitted. (Authorities.) In view of these authorities, can it be said that the city was by the Bullock contract precluded from building waterworks to supply itself with water for purposes other than those stated in that contract, and in addi-

tion to the water there stipulated for? If not, the city had a right to build a plant for such supply."

See Printed Brief of Appellants "On Motion to Dismiss and Affirm and on the Merits," pp. 32, 33, 34, filed in No. 133 of the October, 1905, term of the this Court, being the case reported in 202 U. S. 453.

The scope of the final decree put in issue by the assignment No. VI, and the argument of counsel, oral and written, was evidently fully in the mind of this Court when it decided the case on the merits in 202 U. S. 453. The Court twice decided that the case as made by the pleadings was one making a case for an injunction in a court of equity in the exercise of that valuable feature of its jurisdiction to prevent anticipated and threatened action (185 U. S., p. 82; 202 U. S., pp. 459-460), and that there was not presented by the issues the mere case of a breach of a private contract, but that they disclose an attempt, by subsequent legislation of the city, to deprive the complainants of the rights under an existing contract (*Ibi.*).

In the decision on the merits in 202 U. S., the Court said:

"The decree in the court below was in favor of the Waterworks Company, maintaining its right to the contract for hydrant rentals *and enjoining the city, during the period of the contract, from constructing a waterworks system of its own, and requiring the city to construct a sewer for the disposal of house sewage from the city.*

"The assignments of error necessary to be considered are:

"1. * * * * *

..2. In enforcing the contract with the city in favor of complainant and *restraining the city from erecting waterworks of its own during the term covered by the contract with the complainant.*

"3. * * * * *

"We shall proceed to notice these in the order named.

* * * * *

"*The principal controversy in the case is as to the correctness of the decree of the Court below restraining the city from erecting waterworks of its own within the period named in the contract, which decree proceeded upon the theory that the city had excluded herself from erecting or maintaining a system of waterworks of its own during that period (p. 462).*

* * * * *

"Coming directly, then, to the question whether this is an exclusive contract, the question resolves itself into two branches. Had the city the right to make a contract excluding itself? And, if so, has the contract now under consideration that effect? (p. 465.)"

The Court then proceeded to decide that the city had the right to make a contract excluding herself, saying (p. 467) :

"And we think the question of the power of the city to exclude herself from competition is controlled in this court by the case of *Walla Walla vs. Walla Walla Water Co.*, 172 U. S. 1,"

The *Walla Walla* case is then discussed. In that case there was no exclusive grant, and the city charter prohibited

the making of an exclusive grant, but the City of Walla Walla had specially bound herself *not to erect* waterworks of its own, and reserved the right to take and condemn and pay for the company's works at any time after the expiration of the contract, "and this Court held that for the period mentioned in the contract, and as an incident to the protection of the rights of the contract, the city (p. 468) might exclude itself from competition. We think that case is decisive of the present one on this proposition. We shall proceed to consider whether the language of the contract is such as to prevent the city, during the period named therein from *erecting waterworks of its own.*"

* * * * *

(at p. 469) "In considering this contract we are to remember the well-established rule in this court, which requires grants of franchises and special privileges to be most strongly construed in favor of the public, and that where the privilege claimed is doubtful nothing is to be taken by mere implication as against public rights. This rule has been applied to a series of contracts in waterworks and lighting cases, and we have no disposition to detract from its force and effect. And unless the city has excluded itself in plain and explicit terms from competition with the Waterworks Company during the period of this contract it cannot be held to have done so by mere implication. The rule, as applied to waterworks contracts, was last announced in this court in *Knorrville Water Company vs. Knorrville*, 200 U. S. 22 decided at this term, citing previous cases.

"The contract in the respect under consideration is found in Section 1 of the ordinance, and undertakes to give to Bullock & Company, their associates, successors and assigns, the exclusive right and privilege, for the period of thirty years, from the

time the ordinance takes effect, of erecting, maintaining and operating a system of waterworks, with certain privileges named, for the furnishing of a supply of good water to the City of Vicksburg and its inhabitants, for public and private use.

"Without resorting to implication or inserting anything by way of intendment into this contract, it undertakes to give by its terms to Bullock & Company, their associates, successors and assigns, the exclusive right to erect, maintain and operate waterworks, for a definite term, to supply water for public and private use. These are the words of the contract and the question upon this branch of the case is, conceding the power of the city to exclude itself from competition with the grantee of these privileges during the period named, has it done so by the express terms used? It has contracted with the company in language which is unmistakable, that the rights and privileges named and granted shall be *exclusive*. Consistently with this grant, can the city submit to the grantee to what may be the ruinous competition of a system of waterworks to be owned and managed by the city, to supply the needs, public and private, covered in the grant of privileges to the grantee? It needs no argument to demonstrate, as was pointed out in the *Walla Walla case*, that the competition of the city may be far more destructive than that of a private company. The city may conduct the business without regard to the profit to be gained, as it may resort to public taxation to make up for losses. A private company would be compelled to meet the grantee upon different terms and would not likely conduct the business unless it could be made profitable. We cannot conceive how the right can be exclusive, and the city have the right at the same time to erect and maintain a system of waterworks, which may and probably would practically destroy the value of rights and privileges conferred in its grant. If the

right is to be exclusive, as the city has contracted that it shall be, it cannot at the same time be shared with another, particularly so when such division of occupation is against the will of the one entitled to exercise the rights alone. It is difficult to conceive of words more apt to express the purpose that the company shall have the undivided occupancy of the field so far as the other contracting party is concerned. (at p. 470.)

"The term 'exclusive' is so plain that little additional light can be gained by resort to the lexicons. If we turn to the Century Dictionary we find it defined to mean 'Appertaining to the subject alone; not including, admitting or pertaining to any other or others; undivided; sole; as, an exclusive right or privilege; exclusive jurisdiction.' We think, therefore, it requires no resort to implication or intentment in order to give a construction to this phase of the contract; but, on the other hand, the city has provided and the company has accepted a grant which says in plain and apt words that it shall have an exclusive right, a sole and undivided privilege. To hold otherwise in our view would do violence to the plain words of the contract, and permit one of the contracting parties to destroy and defeat the enjoyment of a right which has been granted in plain and unmistakable terms. On the authority of the *Walla Walla case*, the city had the power to exclude itself for the term of this contract, giving the words used only the weight to which they are entitled, without strained or unusual construction, and we think it was distinctly agreed that for the term named the right of furnishing water to the inhabitants of Vicksburg under the terms of the ordinance was vested solely in the grantee, so far at least as the city's right to compete is concerned. Any other construction seems to us to ignore the language employed and to permit one of the parties to the con-

tract to destroy its benefit to the other. We think the Court below did not err in reaching this conclusion." (at pp. 470-471.)

* * * * *

"We find no error in the decree of the Circuit Court enforcing the contract rights of the complainant and enjoining the city from erecting its own works during the term of the contract."

Thus the broad decree of the lower Court "enforcing the contract rights of the complainant, and enjoining the city from **erecting** its own works during the term of the contract" without any restriction or limitation as to the purpose for which said works were during that period to be erected, the breadth of which decree was distinctly complained of in a special assignment of errors, *was distinctly and specifically affirmed.*

It is true that, in giving its reasons for this affirmance, the Court discussed only the most injurious and destructive purpose for which said works could be constructed during the existence of the franchise—*i. e.*, the construction of such works for the purpose of entering immediately and during the franchise into the business of furnishing water for public and private purposes; but having found that, without resorting to implication, or inserting anything by way of intendment into the contract, it gave the "exclusive right to erect, maintain and operate waterworks for a definite term (p. 470), that it is difficult to conceive of words more apt to express the purpose that the company shall have *the undivided occupancy of the field*, so far as the other contracting party is concerned (p. 470), and that the city has provided and the company has accepted a grant which says in plain and apt words *that it shall have an exclusive right,*

a sole and undivided privilege (p. 471), it was impossible for the Court to have entered this decree of affirmance without intending to cover thereby every other purpose or purposes for which said works might be constructed which would be in contravention of the complainant's right of "*undivided occupancy of the field*" less injurious in their effects than active competition in supplying water to private consumers. Suppose the defendant had passed an ordinance to erect waterworks for the sole purposes of supplying water to its own sewers, which it was not entitled to take free from the owner of the Bullock franchise, and was under no contract to purchase from that owner, of supplying water for additional hydrants, which it was not obligated to rent under the Bullock franchise, and of supplying water to new and additional public institutions which were not entitled to free water under the Bullock franchise, and which the city was not obligated to buy from the owner thereof? Would the defendant have the standing in court now to say that this right, urged by them in their complaint in this court against the breadth of the decree rendered against them below in the litigation which they provoked to test their liability under the complainant's franchise was not foreclosed by the decree of the Supreme Court, because, forsooth, that Court had referred *arguendo* only to the construction of waterworks to be used during the franchise in active competition in selling water? We submit that defendant would not be listened to urging such a defense.

We submit moreover, that the defendant is precluded by the settled rules of law founded on a salutary public policy from now setting up a defense against this decree that it was open to it to urge and that it might have urged under its assignment of errors in this court and that it might have

urged in the lower court before the decree was rendered—*i. e.*, the defense that it had the right to erect waterworks during the existence of the Bullock franchise in order to get ready to supply itself with water when the Bullock franchise had expired, and that so to do would not violate the exclusive Bullock franchise. This defense was indicated to it by the *El Paso case*, reported in 152 U. S., p. 152, a case which was decided by this Court five years before the bill in No. 41 was filed, and on which the defendant now so strenuously relies.

Having provoked a suit which put the whole scope and validity of the complainant's exclusive franchise in issue, it was its duty to set up in defense of its challenge of the validity and binding effect of that franchise every claim it could urge in defense of its right to erect waterworks in the City of Vicksburg during the period of the franchise. It could not set up some of these defenses and then either purposely or by inadvertence or by mistake reserve or omit other defenses, and urge such defenses in another suit on the same cause of action.

**FURTHER DISCUSSION OF AUTHORITIES
UPON THE PROPOSITION THAT THE
JUDGMENT IN THE FORMER SUIT
(NO. 41) IS RES ADJUDICATA.**

(a)

**Legal Effect of Pleading the Bullock Contract
and Franchise in full in the Bill in the
Former Suit.**

Pleaded in full as Exhibit B in No. 41, the *former suit*, at *Rec.*, p. 107; copy at *Rec.*, pp. 98 to 105.

Pleaded in full as Exhibit A in *present* suit, No. 119, at top of p. 50 of *Rec.*; copy at *Rec.*, p. 98 to p. 105.

The effect of making the franchise a part of the bill of complaint by way of an exhibit was to set up and plead every right accruing to the water company under the franchise which had been or was threatened to be transgressed by appellant in building new works.

In support of this proposition we cite the case of *American Bell Tel. Co. et al. vs. Southern Tel. Co. et al.*, 34 Fed. Rep. 803, in which the Court said:

"So far as respects the other matter—the special demurrer to the bill—the bill alleges that the complainant has a patent, giving number and date, and, in a general way, that it is one for the process of telephonic transmission of words, and makes profert of the patent. The weight of authority is that the profert of any recorded instrument is equivalent to annexing a copy (*Bogart vs. Hinds*, 25 Fed. Rep. 484, and cases cited; *Post vs. Hardware Co.*, 26 Fed. Rep. 618); and if a party avers that he holds title to any thing by a certain instrument, which he annexes, and that instrument both grants the title and describes the full extent of the rights conferred—and the patent does that—it is a grant from the government, and it describes exactly and specifically what is granted—it is equivalent to an averment that he has title to all the rights specifically described in such instrument. It would not be assisted or strengthened by separate averments that he held a right to this claim and that claim, enumerating them specifically. He avers that he has title to all when he says that he has a patent which contains all."

The following authorities and cases support the opinion above:

3 Ency. P. & P., pp. 362, 363.

8 Ency. P. & P., p. 740.

Electrolibration Co. vs. Jackson, 52 Fed. Rep. 773.

Samuel Cupples Envelope Co. vs. Lackner, 99 N. Y. App. Div. 231 (90 N. Y. Sup. 954).

Miller vs. Wayne International Bldg. Assn., 32 Ind. App. 480 (70 N. E. 180).

This seems to us to be entirely *inconsistent with any of the authorities cited* by counsel for the city, or with any we have been able to find. Certainly it does not comport with the language in the opinion in the case of *American Bell Tel. Co. vs. Southern Tel. Co.*, 34 Fed. Rep. 803, *quoted above*, in which the Court declared that the complainant's having made the patent upon which he predicated his rights an exhibit to his bill of complaint was "equivalent to an averment that he has title to all the rights specifically described in such instrument."

If appellant's contention were correct, the city might bring as many suits as it saw fit to set aside and annul the franchise. It could test in separate suits every conceivable aspect of the contract.

(b)

Upon the point that a party cannot split up his cause of action for part of an indivisible demand, we quote from *Texas vs. White et al.*, 22 Wall. 157 (22 L. Ed. 819), as follows:

"It would be to trifle with the Court to make a proceeding in equity, designed to give relief and to

administer complete justice, to depend upon the skill and jugglery by which a defendant might conceal some part of his defense to that suit until it was decided against him, and then set up as an excuse for disobeying the final decree of the Court, or hold it out as the basis of another suit for the title or possession of the same bonds. And whatever difference of opinion may be found in the authorities on the nice distinctions involved in the question of what is concluded in suits at law, and without even the necessity of going so far as this Court has gone in actions at law in holding that all that might have been set up as a defense in the action must be concluded by the judgment, we are of the opinion that, in such a case as this, in a suit in equity, when the obvious purpose of the bill to establish and adjudicate the entire rights and title of the parties before the Court, * * * the decree must be final and conclusive on all the rights of all the parties actually before the Court."

That the *same rule is applicable* to an attempt to *split up a defense*, see *Beloit vs. Martin*, 7 Wall. 619.

The case of *Dimock vs. Revere Copper Co.*, 117 U. S. 559 (29 L. Ed. 994), is also in point.

In this case Dimock, the defendant below, failed to plead a discharge in bankruptcy in a suit brought against him by the Revere Copper Company, and let judgment go by default. Afterwards the Revere Copper Company brought suit on the default judgment, and Dimock this time pleaded his discharge in bankruptcy. The lower Court held this *res adjudicata* against Dimock, and gave judgment against him on the former judgment.

Justice Miller, who rendered the opinion of the Court, said:

"It is said, however, that, though the defendant had his discharge before the judgment in the State court was rendered, and might have successfully pleaded it in bar of that action, and did not do so, the judgment now sued on is the same debt, and was one of the debts from which, by the terms of the bankruptcy law, he was discharged under the order of the bankruptcy Court; and to make any attempt to enforce that judgment the discharge may still be shown as a valid defense. That is to say, that the failure of the defendant to plead it when it was properly pleadable, when, if he ever intended to rely on it as a defense, he was bound to set it up, works him no prejudice, because, though he has a dozen judgments rendered against him for this debt after he has received his discharge, he may at any time set it up as a defense when these judgments are sought to be enforced. Upon the same principle, if he had appeared in the State court and pleaded his discharge in bar, and it had been overruled as a sufficient bar, he could, nevertheless, in this action on that judgment, renew the defense.

* * * * *

"We are of the opinion that, having in his hands a good defense at the time judgment was rendered against him—namely, the order of the discharge—and having failed to present it to a Court which had jurisdiction of his case, and of all the defenses which he might have made, including this, the judgment is a valid judgment, and that defense cannot be set up here in an action on that judgment."

In *Southern Pacific Railroad Company vs. United States*, 168 U. S. 1 (42 L. Ed. 355), a case very similar to that at bar, the Court said:

"It is said, however, that, under the pleadings and evidence in this collateral proceeding, it is open to the Southern Pacific Railroad Company to renew the contest as to the sufficiency of the maps of 1872, filed by the Atlantic and Pacific Railroad Company, and to show that they were not maps of definite location."

"Is this position consistent with the settled rule of the law as to the conclusiveness, between parties and their privies, of the final determination by a Court of competent jurisdiction of matters put in issue by the pleadings?"

* * * * *

"The general principle announced in numerous cases is that a right, question or fact distinctly put in issue, and directly determined by a Court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property if, as between parties and their privies, conclusive-

ness did not attend the judgment of such tribunals in respect of all matters properly put in issue and actually determined by them."

To the same effect, see:

City of Aurora vs. West, 7 Wall. 82 (19 L. Ed. 42).

Tioga Railroad Co. vs. Blossburg and Corning Railroad Company, 20 Wall. 137 (22 L. Ed. 331).

Cromwell vs. County of Sac., 94 U. S. 351 (21 L. Ed. 195) under the aspect quoted and applied in *Fayerweather vs. Ritch*, 195 U. S. 276.

(c)

Under the rule laid down in the foregoing cases, it was the duty of appellant in *Suit 41* to plead its right to build non-competing works, if it ever desired to make such contention; and, having failed to do so, it is now estopped.

In other words, the foregoing cases are applicable, *even if one claim be incorrect*, which we have pointed out to be true that the question upon which we claim the conclusiveness of the thing adjudged, a *particular interpretation* demanded in our bills in No. 41 of the contract and franchise therein pleaded in full, is a *question of law* and that it was distinctly put in issue by the demurrer pleaded in the answer in No. 41, and separately put in issue by the general and specific denials therein.

(d)

Authorities illustrating the distinction between error in construction of document, to be corrected *only* upon appeal, and not collaterally, and lack of jurisdiction, which alone subjects judgment to collateral attack.

Hine vs. Morse, 218 U. S. 493.

Fayerweather vs. Ritch, 195 U. S. 276.

The *latter* case indicates the extent to which an appellate Court should go to support jurisdiction claimed lacking.

There the question upon which absence of jurisdiction was claimed was that the State Court had failed to pass upon a material issue raised by the pleadings, and upon which the findings and decree were silent and the trial Justice testified that he had not considered.

This Court held that these facts sufficiently supported the claim in the Federal Circuit Court to protection against a State judgment under the Fifth Amendment to clothe the Court with jurisdiction to inquire whether the judgment was void on that score.

But then, after taking jurisdiction, and making judicial inquiry into the record of the State Court judgment, this Court held that the failure to pass upon the issues in the trial court was cured by the proceedings on appeal, from which it was *fairly inferable* that the appellate Court had had brought to its attention and passed upon the issue upon which the trial Court had neglected to pass. One of the sources of such inference was that the attention of the highest State appellate court had been sufficiently drawn to the neglect in a *motion to amend its remittitur*.

Hine vs. Morse (above).

After all, it seems that *appellant's whole contention is nothing more than a play on words* as to their proper meaning and signification. The whole controversy is based upon the meaning of "exclusive right to erect waterworks." What do these words mean? In Suit 41 the Court construed them to give Bullock & Company the "sole and undivided right" to the use of the streets for the purpose of building waterworks. Appellant now claims that the words ought not to be given so broad a meaning; that they do not, properly construed, include the building of non-competing waterworks.

The only question open for consideration now is whether or not the Court in Suit 41 had jurisdiction to construe these words. If it did, the question is closed; otherwise, a controversy of this kind would never be ended.

In *Hine vs. Morse* (above) this Court said:

"The Supreme Court of the District had jurisdiction over the subject-matter, the *res*. It had jurisdiction over the parties. It was, according to due course of equity proceedings, called upon to examine the will and the statute which gave the power to make the sale in certain circumstances. If, then, jurisdiction consists in the power to hear and determine, as has so many times been said, the Court errs in holding that a case has been made, either under its inherent power or its statutory authority, can it be said that it has usurped jurisdiction, and that its decrees are absolute nullities? To this we cannot consent. If the Court was one of general and special jurisdiction, if, under its inherent power, supplemented by statutory enlargement, it had jurisdiction, under any circumstances, to sell the real estate of minors for reinvestment, it had jurisdiction to examine and determine whether the particu-

lar application was within or beyond its authority. To do this was jurisdiction. If it errs, its judgment is reversible by proper appellate procedure. But its judgment, until it be corrected, is a judgment, and cannot be regarded as a nullity.

* * * * *

"Jurisdiction is authority to hear and determine. It is an axiomatic proposition that when jurisdiction has attached, whatever errors may subsequently occur in its exercise, the proceeding, being *coram judice*, can be impeached collaterally only for fraud. In all other respects, it is as conclusive as if it were irreversible in a proceeding for error."

Further Authority That Mistake of Law Is Mere Error.

In *American Express Company vs. Mullens*, 212 U. S. 311 (53 L. Ed. 525), Justice Brewer, speaking for the Court, said:

"A judgment is conclusive as to *all the media concludendi*, * * * and it needs no authority to show that it cannot be impeached, either in or out of the State, by showing that it was based upon a *mistake of law*."

The foregoing authorities make it clear that the only question open for discussion is that of jurisdiction. If the pleadings sufficiently put the franchise before the Court to give it jurisdiction to pass on the validity of the contract, and to interpret its meaning, then, as requested in effect by both sides, that interpretation must stand, however erroneous. If erroneous, it was the duty of appellant to assign the error on the appeal in that case; and having failed to do so it may not now take advantage of it. We have shown

that, *in fact*, appellant did point out what it now can claim, we submit, only as error of this Court (202 U. S. 453) and the lower Court in No. 41.

(e)

Distinguishing Cases Cited for the City.

The cases cited by appellant seem to us to have but little bearing upon the case at bar. They are to the effect that a former judgment does not estop a subsequent suit as to *subject-matter* not before the Court in the suit in which the judgment was rendered. A careful reading of the cases will show that in each instance where it was held there was no estoppel the subject-matter was not in any sense before the Court so as to give it jurisdiction to render the decree complained of. It is always a question of jurisdiction. If the Court has jurisdiction to render the decree, the estoppel is all to the effect that on direct appeal the Court will look into the question as to whether the relief granted exceeds that which ought to have been granted under the pleadings, or is in any way different from that which ought to have been granted; and that, if any error be found, it will be corrected. They have no bearing on the case at bar, because Suit 41 is not on direct appeal, but is here set up collaterally by way of estoppel. The right to consider mere error in that decree died with the direct appeal. The decree can now be attacked only on the ground of fraud or upon the ground that it is absolutely void.

The cases cited by appellant can, therefore, have no application.

Counsel for appellant apparently *overlook the fact* that appellant's attack on the decree in Suit 41 is *collateral*, and

that nothing can now be considered except the jurisdiction to render it. If there was jurisdiction, *it may be ever so erroneous*, yet it must stand as rendered.

See *Case vs. Beauregard*, 101 U. S. at page 692, where this Court said:

"Thus it appears the bill exhibited all that was necessary to give to the Court, sitting as a court of equity, complete jurisdiction over the subject of the controversy between the parties and over all the equities now asserted by the complainant in his present suit. It must, therefore, be held that the decree dismissing that bill determined the equities of the case. And this must be so, whether the reasons for the dismissal were sound or not. That decree was affirmed in this court, and affirmed on the merits. We regarded the case and treated it as requiring an adjudication upon the complainant's equity to be paid out of the property in the hands of the railroad company. Nothing that can now be done in another suit can take away the legal effect of the decree. Even were we of opinion that the case was erroneously decided, it would still be *res judicata*, a bar to the complainant, a protection to the defendants. It would be idle, therefore to reconsider the question whether the bank has a lien upon the property he seeks to charge, or whether there had been a trust in the bank's favor."

Appellant had a *right to file a suggestion of error* in Suit 41 and therein set up the contention it now makes; but, having failed to do so, the decree is *not* now open to attack, unless as suggested above.

It filed a general suggestion of error that the decree was too broad, and complained in its brief that under this decree it was prohibited from erecting waterworks during

the franchise for any purpose, and argued that it had the right to erect waterworks during the existence of the franchise for certain specific purposes, but failed to argue that it had the right to erect them for the purpose of being operated after the franchise had expired. It is too late now to ask the Court to amend its decree in this respect.

The case of **Reynolds vs. Stockton**, 140 U. S. 254, *quoted at length in appellant's brief*, pp. 35-36, was a suit by the policy-holders of the Hope Mutual Life Insurance Company of New York and one of the stockholders of that company against the Superintendent of Insurance of the State of New York and the Hope Mutual Life Company, and the receiver of the New Jersey Mutual Life Company seeking to subject a deposit of \$100,000 made by the Hope Mutual Life Company with the Superintendent of Insurance of New York as a guarantee to the policy-holders of said Hope Mutual Life Company. The suit went to judgment holders *pro tanto*. This decree is described in the opinion as follows :

"A decree was entered, which decree confirmed the report of the referee, and made final disposition of the funds in the hands of the superintendent of the insurance department, in partial payment of the various claims presented. It also, in paragraph 8, contained this reservation.

" 'And it is further ordered that either party to this action or any person interested in the subject-matter thereof have liberty to apply for further directions on the foot of this decree, and the question of the inheritance of Joel Parker, as receiver of the New Jersey Mutual Life Insurance Company, and the former superintendent, John F. Smyth, and William McDermott, and Messrs. Harris and Rudd, reported by Referee Samuel Prentiss, be reserved.' "

Afterwards, without notice to any of the parties, judgment was entered against the defendants in favor of the plaintiffs for one million and odd dollars. Suit was brought on this judgment in the Chancery Court of New Jersey, which Court declined to recognize the judgment as an adjudication against the receiver of the New Jersey Insurance Company, or as a liability against the assets of said company in his home. This decision was on appeal affirmed by the Supreme Court of New Jersey, whereupon a writ of error was prosecuted to the Supreme Court of the United States, which Court said:

"The section of the Federal Constitution which is invoked by plaintiffs is Section 1 of Article IV * * * provides that 'full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State.' * * * It does not demand that a judgment rendered in a court of one State, without the jurisdiction of the person, shall be recognized by the Courts of another State as valid, or that a judgment rendered by a Court which has jurisdiction of the person, but which is in no way responsive to the issues tendered by the pleadings and is rendered in the actual absence of the defendant, must be recognized as valid in the courts of any other State. The requirements of that section are fulfilled when a judgment rendered in a court of one State, which has jurisdiction of the subject-matter and of the person, and which is substantially responsive to the issues presented by the pleadings, or is rendered under such circumstances that it is apparent that the defeated party was in fact heard on the matter determined, is recognized and enforced in the courts of another State."

From the foregoing it is apparent that the *Reynolds case* was not a suit for a personal judgment, but was merely

a proceeding to subject the funds in the hands of the insurance commissioner to the payment of certain debts.

After it had proceeded to a final decree under the pleadings and presumably was at an end, a further decree was rendered without notice giving the complainants a personal decree against defendants. The Court treated this extreme case as close and argued it at great length before reaching the conclusion that there was no jurisdiction to render the last decree.

The object sought in Suit 41 was the annulment of the Bullock franchise, and the decree instead of annulling the same established it, and having done so enjoined the appellant specifically from building waterworks during its life. It seems to us that it cannot be said that there was want of jurisdiction either as to the parties, or as to the subject-matter of the decree. Certainly the *Reynolds* case is not in point and affords *no* precedent.

The cases cited on pages 44, 45 and 46 of appellant's brief and the case of *Conway vs. Taylor's Executor*, on pages 62, 63 and 64, are all to the effect that on direct appeal the Court will look into the question as to whether the relief granted exceeds that which ought to have been granted under the pleadings, or is in any way different from that which ought to have been granted, and that, if any error be found, it will be corrected. They have no bearing on the case at bar, because Suit 41 is not on direct appeal, but is here set up collaterally by way of estoppel. The right to consider mere error in that decree died with the direct appeal. The decree can now be attacked only on the ground of fraud or upon the ground that it is absolutely void.

**APPELLANT'S TREATMENT OF THIS
COURT'S OPINION IN THE FORMER
SUIT BETWEEN THESE PARTIES (202
U. S. 453).**

We have replied at length to the *Reynolds vs. Stockton case*, because it is apparent from appellant's brief that they have relied upon the same. *The other cases seem to have clearly as little bearing as that*, but we shall not take the time of the Court to review them.

Rather, we take a little more space to reiterate that there can be no better test as to what was before the Court in *Suit 41* than the language of the *opinion rendered in that case*. In describing the issues raised and presented for adjudication, Justice Day, who rendered the opinion, said:

"The principal controversy in the case is as to the correctness of the decree of the Court below restraining the city from erecting waterworks of its own within the period named in the contract (Bullock franchise), which decree proceeded upon the theory that the city had excluded itself from erecting or maintaining a system of waterworks of its own during that period."

It will be noticed that the brief of appellant does *not* quote or refer to *that part of the opinion* above set out, which seems to us to be the very essence of the opinion on the question now under investigation. It is hardly conceivable that Justice Day was not sufficiently familiar with the pleadings to correctly state the issues raised, but either

he was not or counsel for appellant are wrong. Their contention is that the very issue which he states as "principal controversy" was not raised by the pleadings at all.

APPELLANT'S TREATMENT OF THE OPINION IN
THE SUIT BETWEEN THESE PARTIES IN
206 U. S. 496.

Counsel for appellant further contend that this Court, in rendering the opinion in the suit of **City of Vicksburg vs. Vicksburg Waterworks Company**, 206 U. S. 496, construed the opinion rendered by it in Suit 41 so as to limit the injunction in Suit 41 to the establishment of competing waterworks, leaving appellant free to build non-competing works. We do not consider that the opinion in the last case has any such effect. It was contended in the latter case that the decree in Suit 41 precluded the city *from regulating the water rates* then in force. A casual review by the Court of the opinion in 41 disclosed that the rate question was not before the Court in 41. What the Court actually said on this point was:

"While it is true that the decree is very broad, we cannot agree to the contention of the appellee that it finally disposed of the matter now in controversy. When the case was first here, reported in 185 U. S. 65 while there are expressions in the opinion affirming the validity of the contract and the authority of the city to make it, the issue really decided was as to the jurisdiction of the court as a Federal court, which was sustained, and the cause remanded for further proceedings. Upon the second hearing of the case, and the appeal here, the opinion shows that the adjudication was regarded as settling the right of the Vicksburg Waterworks Company, under the contract to carry on its business without the competi-

tion of works to be built by the city itself, as the city had lawfully excluded itself from the right of competition; and it was further held, as incidental to that controversy, in passing upon an issue made in the suit that the Vicksburg Waterworks Company had succeeded to all the right, title, and interest of the original contracting party, and that the contract, having been made prior to the Constitution of 1890, was not controlled by its provisions. The right to recover for rentals was also directly involved, as the city had denied its liability therefor, and an accounting was prayed in the original bill and the decree specifically disposed of that issue. It is true that in the answer it was averred that the alleged contract imposed upon the inhabitants of Vicksburg an onerous and extortionate burden; 'that no such contract would now be made with the Vicksburg Waterworks Company or any other company; that the rates authorized in said ordinance far exceeded the rates charged in other cities under like circumstances and in general terms,' the city denied that it was bound to the complainant by contract; 'that for the many reasons therein set forth no liability existed on the part of the city by reason of the contract.'

"An examination of the record in the former case shows that the only testimony taken in the case, as to the reasonableness of the rates charged to private consumers, was on behalf of the company, and tended to show that the rates charged were reasonable, and if it could be said that the pleadings put in issue the reasonableness of the rates then charged, *was the right of the city to regulate rates under a subsequent law of the State necessarily involved and concluded?* The determination of issues as to the right of injunction against the city building its own works, or denying liability or refusing to pay the rentals contracted for, and a finding that existing rates were reasonable, *did not necessarily conclude*

a controversy which might thereafter arise as to the right of the city to fix rates when the Legislature of Mississippi should pass a law for that purpose, giving the city the right to regulate the same. It is to be remembered that when the bill was filed in the original case no such law had been passed; that when the act of March, 1904, went into effect the case was nearly ready for final decree, and the city passed its ordinances long after the beginning of the suit, and shortly before that decree. No supplemental bill was filed, but after the decree, in January, 1905, the present independent suit was brought with a view to enjoining the proposed action of the city in enforcing ordinances regulating the rates by charges other than those contained in the contract.

"Upon the appeal, the question seems to have been argued by the city as though made in the case, though the brief on behalf of the appellee contends that the act of 1904 was not involved. But a decree must be read in the light of the issues involved in the pleadings and the relief sought, and we are of opinion that the matters now litigated were not involved in or disposed of in the former case, and that when properly construed the decree does not finally dispose of the right of the city to regulate rates *under a law passed after the contract went into effect and long after the bill was filed in the case.*"

This was all that was necessary for the Court to determine in reference to Suit 41, and it was all that was actually determined by the Court. The fact that competition was involved in 41 was noted by the Court in this investigation, and attention was called to it; but, not being a matter necessary to be determined by the Court, it cannot be treated as a judicial construction of the former opinions beyond the point necessary to be determined. Besides the quotation from the opinion in the 206 case set out in

appellant's brief on pages 61 and 62, the Court further *expressly says*:

"The determination of issues as to the right of injunction against the city *building its own works* * * * did not necessarily conclude a controversy * * * as to the right of the city to fix rates." (Our italics.)

This quotation has no reference to competition, and we think it manifest therefrom that the Court was *not* undertaking to define its former decree *so as to limit it* to competition merely.

In the case of *Walla Walla vs. Walla Walla Water Co.*, 172 U. S. 1, this Court referred again and again to the ruinous effects of city competition, yet the actual decree *made no mention of competition*, but merely enjoined the City of Walla Walla from building new waterworks during the life of the franchise in question. This, of course, was on the theory that there could be no competition if the city was precluded from building its own waterworks. The injunction against building put an end to the question of competition. It was the greater relief, and included the lesser, so as to make it unnecessary to decree on the lesser. The city in the *Walla Walla* case contracted *not* to build during the life of the franchise, while in the *Vicksburg* case the city contracted to give Bullock & Company *the exclusive right to build*, which necessarily excluded the city from building. The right given to Bullock & Company *could not be exclusive* if the city reserved to itself any part of that *right.*

(f)

The argument for the City, made by the City's counsel at great length in their brief, that the prayer of the bill in the former suit (No. 41) was insufficient in law to support the decree for relief because the prayer for an interpretation prohibiting the City from building for any purpose (Rec., p. 26) had not been alleged as a conclusion of law in the body of the Bills.

There are *two* separate and distinct answers to this one of the city's contentions:

FIRST. The one in several places elsewhere suggested that the allegations in the body of a bill of *conclusions of law*, such as the claimed interpretation of a particular contract, are immaterial. *Good pleading* does not call for the averment of conclusions of law, although for purposes of clearness of narrative the pleader may deem it desirable to here and there prevent gaps in the sequence of his statement by inserting them. The pleading of the contract and franchise in full, in other words, was sufficient to comply with the rule which Appellant's counsel invoke; even if no allegation at all had been contained in the body of the Bills relative to the respect in which interpretation was desired. We should also be prepared to contend, *if necessary*, that any question as to the legal effect of this contract and franchises, pleaded at length, as in the two Bills in No. 41, could be

properly raised by complainant under a prayer for general relief. But it is not necessary; since the prayer for relief in our amended and supplemental bill in No. 41 not only *specifically* asked for an injunction against the City's building irrespective of competition; but misinterpretation of that prayer was rendered impossible because of the separate specific prayer for an injunction against the City's building for purpose of competition.

See *Rec.*, pp. 26, 44, 29 and 38-39 and quotations therefrom and discussions thereof. *Infra*, 10-13, 23-24)

The *demurrer* (*Rec.*, p. 44) in the answer (The answer was in terms made to both original and supplemental and amended bill, *Rec.*, p. 27), illustrates the above. It is elementary that it admitted no conclusions of law in the bills.

Hence, it admitted no allegations either in the body of the bills, or in the prayers, as to the legal effect of the contracts and franchises pleaded in full in the two bills.

Second. If the admission in the answer (*Record*, page 29, made clearer by *Rec.*, pp. 38-39) was effective to subtract anything from the effect of the generality of the demurrer (*Rec.*, p. 44) it served but to make the more pointed the issues of law raised by the demurrer. It did so by notifying the company that it would not contest: *first*, the specific issue of law as to the exclusiveness of *the right granted the Company to build and maintain free from infringement by the City for any purpose* (See *Sup. and Am. Bill at Rec.* page 26.) so far as the exclusiveness of the right to maintain was concerned; and (*second*), that it would not contest the separate specific issue of law, as to the exclusiveness of the right granted the Company to build and maintain free from infringement by the City for *purpose of competition*

(See: *same Rec.* at p. 26) to the same extent, viz: so far as the exclusiveness of the right to maintain was concerned.

In other words, the admission made specific the issues of law raised by the demurrer by narrowing them: *1st*, to a denial that the Company had the contract right to enjoin the City from building for any purpose; *2nd*, to a denial that the Company had the contract right to enjoin the City from building for competitive purposes.

It is unnecessary to make further reply than the above to appellant's contention that the allegations are insufficient in law to support the prayer of our bills in 41, and the express findings in the decree.

But, to show the emptiness of the contention, we go further. We do so upon the assumption that appellant *still* be unwilling to concede that *good pleading* for the purpose of giving the constitutional notice required by the Fifth Amendment, or required by any other rule of law, does *not* necessitate the allegation in the body of the bill of an interpretation desired of a contract set forth at length in the bill; and, to the contrary, that the requirements of good pleading are satisfied by a general prayer for relief; and *a fortiori*, as in the bills in 41 in question, by a specific prayer for the particular interpretation desired. (*Rec.*, p. 26.)

The city's contention in this regard, however, seems necessarily based upon the further untenable assumption that an allegation of the legal effect of a contract pleaded in full is an allegation of fact, or conclusion of fact. Such an allegation undeniably is a conclusion of law.

We cheerfully admit that upon an issue of fact tendered a specific prayer cannot usually lay the predicate for greater relief than the *averment of fact* warrants. But the issues here of contract construction are issues of law. Even if they were issues of fact, we submit that a decree under a

prayer for general relief may extend beyond the averments of the bill (or of a special prayer.)

The only limitation upon the relief which then may be granted is that it must be predicated on the entire record before the Court. In this instance, upon the answer as well as the bill. A decree interpreting a bill was upheld by resorting to the answer for a part of the will not pleaded in the Bill of Complaint in *Cavender vs. Cavender*, 114 U. S. 464.

The relief granted may be erroneous because *not* sufficiently supported by the record, and, therefore, subject to reversal on direct appeal; but, for the purpose of collateral attack, the only requirement is that it shall conform to *due process of law*. (*Fayerweather vs. Ritch (above)*, 195 U. S. 276.) A decree *entirely foreign* to the issue of fact raised by the pleadings would be void, and could be attacked collaterally, because the Court would have no jurisdiction or power within jurisdiction (*Windsor vs. McVeigh*, 93 U. S. 274) to render it. Jurisdiction to try a cause is conferred necessarily by the pleadings, and, if the pleadings raise but one issue of fact, jurisdiction to try that issue arises, but not jurisdiction to try some other issue of fact.

If Suit 41 had not put in issue the validity and legal effect of the Bullock franchise, the Court would not have acquired jurisdiction to determine either its validity or meaning, and any decree as to either would have been void and subject to collateral attack; but, since the pleadings called for an adjudication of both the validity and the legal effect, it had jurisdiction to decree on both; and, having jurisdiction, its decrees, however erroneous, may not be inquired into or altered in this proceeding. All that is now open for interpretation is the meaning of the decree on its face.

II.

On the proposition that the original Bullock franchise excluded the defendant city from erecting and maintaining during the existence of the franchise a water system of its own, even one to be operated after the Bullock franchise had expired.

At the time this franchise was granted the City of Vicksburg had no waterworks, but had legislative authority by the Act of 1886 "to provide for the erection and maintenance of a system of waterworks to supply said city with water, and to that end to contract with a party or parties who shall build and operate waterworks."

Bullock & Co. agreed to "build and operate" a waterworks system for the city, under an *exclusive* franchise for thirty years. The terms of this exclusive franchise are stated above. It will be noted that while the city *reserved the right to buy*, and obligated the grantee to sell during the whole life of the franchise, *she did not obligate herself to buy*, or to indicate whether she would buy or not, except at certain periods, one of which expired contemporaneously with the franchise itself. It thus appears what a dangerous and precarious position the water company would be in at the termination of its franchise, if the city should not exercise her option to buy. The company would have an immense plant, which would have no value except as junk. It would have many miles of water pipes buried in the ground which would be good as water pipes for 100 years, but which it would not pay to dig up and sell as old pipe or as old iron.

Its right and power to use all this property for the purpose for which it was organized would pass out of existence on the day its franchise terminated.

It is manifest that the parties took all this matter into consideration when this contract was made. It was evidently contemplated by both parties that the city, if it did not elect to grant the owners of the waterworks a new franchise, *would buy* the property either during the franchise or at its termination, and machinery was provided whereby the price to be paid would be settled with perfect justice and equity to both parties. It is equally manifest that both parties knew that when this franchise expired the city was bound to have a waterworks system as a matter of public necessity either by renewing the franchise, purchasing this plant or by erecting another. But if the city could erect another during the existence of the granted franchise, all incentive to buy the existing plant would disappear. If it could not erect a new plant during the existence of the franchise, it would have a compelling incentive to buy the existing plant or renew the franchise, because it would be an intolerable situation for the city to be without a public or private water supply during the time necessary to erect a new plant. It is evidently for these reasons that the grantee, in lieu of the *obligation* to buy at the end of the franchise, usually inserted in contracts of that character, consented to invest the large capital required to erect these works and put it in the precarious position, because of the stringent character and language of the exclusive franchise, well knowing that if that franchise was enforced and protected according to its terms, and in the light of the situation of the parties, *the city would be compelled to exercise its option to buy*, if it decided not to renew the franchise. The city evidently looked at the matter in the same light, and agreed to this

stringent franchise, well knowing that its terms would compel her to buy the plant, or grant a new franchise, her citizens and officers not at that time conceiving that any community or any set of public officers could deliberately go to work wantonly to destroy the capital invested in these waterworks; because it would be a wanton destruction of capital for the City of Vicksburg to refuse to buy this plant which is ample and sufficient for all of her purposes, and thus reduce it to junk, and to spend the value of the plant in the erection of another plant for the same purpose.

Interpreting then this "*exclusive franchise*" in the light of the then situation of the parties and in the light of what the situation of the parties will be at the end of the thirty year franchise, every equity is with the owner of the franchise and a court of equity will go to the farthest limit to prevent the unnecessary destruction of property and the wiping of wealth out of existence.

It will be noted that the exclusive franchise is not merely one to supply water to the City of Vicksburg and her inhabitants for thirty years, but it is an exclusive franchise "of erecting, maintaining and operating a system of waterworks," and "*of using the streets, alleys, public squares and other public places * * * for the purpose of laying pipes, mains and other conduits, and erecting hydrants and other apparatus for conducting and furnishing * * * water to the City of Vicksburg, Miss., and to its inhabitants for public and private use, etc.*"

If an exclusive franchise means what this Court says it means, "*that the rights and privileges named and granted shall be **EXCLUSIVE***" (202 U. S., p. 470), "*that the company shall have the undivided occupancy of the field so far as the other contracting party is concerned*" (*Ibi.*), "*that the city has provided and the company has accepted * * **"

a sole and undivided privilege" (*Ibi.*, p. 471), "that if the right is to be exclusive * * * it cannot at the same time be shared with another, particularly so when such division of occupation is against the will of the one entitled to exercise the rights alone" (*Ibi.*, p. 470), then the city cannot during the franchise enter upon the streets, alleys and public squares and other public places of the city to lay down her pipes, mains and conduits and erect hydrants and other apparatus for waterworks purposes and thereby almost necessarily disturb remove and displace the similar apparatus of the exclusive grantee, and particularly the thousands of connections with the private service pipes, which run from the property line to the curb line where they meet the connections of the waterworks laid in the public places.

In reality, this question of contractual interpretation which appellant has exalted to the first place in its printed argument (*page 8*), besides being no longer open to discussion, because concluded by the judgment in the first case (*No. 41*) is immaterial, the language of the clause being plain, and consequently there being no room for judicial construction. It is no function of a court of equity to revise an unambiguous contract when, as here the parties are competent, duly authorized and deal at arm's length. Nevertheless, we submit, we have shown above that if the contract in respect to the exclusiveness of the right to build were so obscure as to warrant judicial construction, the balance of the equities would favor the literal, with which the spiritual and contextual meaning correspond, rather than what the appellant chooses to call the equitable meaning.

Upon this question of contractual interpretation, the *El Paso* and *Sioux Falls* cases are not authorities. No case

interpreting a detached clause in a contract is an authority in passing upon another contract that happens to contain the same or a similar clause, unless the remaining portions of both contracts are the same, or substantially the same.

Apparently, the circumstances of the presentation of those cases for decision, made it unnecessary in each of them for the Court to give sufficiently detailed consideration to the interpretation of the clauses in question to make it worth while to set out the other parts of the contracts in which they occurred. What were these circumstances?

It appears from the opinion in the *El Paso case* (152 U. S. 157) that the construction given was not in response to an issue in the cause and, therefore, was not argued by counsel. The legal conclusion stated the mere argument of the Court to show that the record did not disclose that the jurisdictional sum of \$5,000 was involved. It does not appear from the opinion that a different conclusion would have been reached by the Court if it had assumed that the exclusive franchise precluded the City of El Paso from building waterworks during the term of the franchise. This assumption would still not have necessarily shown the requisite jurisdictional sum. The fact was that the record before the Court made no declaration as to the amount involved, nor did it give any data from which the Court could logically reach the conclusion that the requisite jurisdictional amount was involved. In this state of the case, Justice Brewer, who rendered the opinion, undertook in a casual way to consider elements of damage which might result and, in arguing this out, he said:

"The time for which the exclusive right, as claimed, was given, was fifteen years, and the city would be guilty of no breach of any obligation if, during the life of the contract, it proceeded to sink

artesian wells, to establish waterworks, and put itself in condition to, in the future and after the termination of the fifteen years, supply water for all public and private purposes. Suppose that the very next day after the acceptance by the grantee of these franchises the city had commenced the work of sinking artesian wells and establishing a system of waterworks, and had continued in its labors in that direction during the entire life of the contract; that would have been no breach of its obligations to the plaintiff."

This statement does not seem to us to convey the force and effect of a solemn opinion by the Court rendered upon issues raised by the pleadings and argued by counsel. On the contrary, it would seem to be nothing more than mere *obiter dictum*; even if the other clauses of the contract undisclosed by the opinion were substantially the same as those in the contract in this case.

We know that the Court in the *Walla Walla case*, which followed it by a few years, reached the conclusion that a city might preclude itself from building during the life of a franchise and that Walla Walla had done so by express terms.

In the case of the *City of Vicksburg vs. Vicksburg Waterworks Company*, 202 U. S. 453, while the franchise now in question was being considered by this Court, Justice Day, speaking for the Court, said (at p. 468) :

"In the *Walla Walla case* the same general power to make the contract existed. There was an express provision against making an exclusive contract, and this Court held that for the period mentioned in the contract, and as incident to the protection of the rights of the contractor, the city might exclude itself from competition. We think that case is decisive of the present one on this proposition."

Having in mind the consideration before adverted upon, that both the *Walla Walla* case and the *Vicksburg* case were decided long after the *El Paso* case, it seems to us that the quotation last above, apart from the question of *res adjudicata*, is decisive of the right of the city to exclude itself and of the fact of its having done so.

An examination of the *El Paso* case shows that the city in granting the waterworks franchise did not reserve the right to buy as in the *Vicksburg* case, nor any right to condemn as in the *Walla Walla* case, and therefore at the end of the franchise she would be absolutely helpless if she could not prepare herself to meet this contingency. This consideration evidently had its weight with the Court in reaching the result set forth in its *obiter dictum* relied on by defendant.

Counsel for appellant also refer to the case of *Sioux Falls vs. Farmers' Loan and Trust Company* as supporting their view of the Bullock franchise. In reference to which they say on page 24 of their brief:

"Counsel for appellee seek to distinguish this case on the ground that the franchise had expired shortly before the Circuit Court of Appeals delivered its opinion. No allusion whatever was made to this fact in the opinion, and it is doubtful if the Court even observed it. Counsel acquired their information only by comparing the date of the expiration of the franchise with that of the delivery of the opinion."

The opinion of the Circuit Court of Appeals expressly states as follows:

"The only contract between the city and the water company expired before the decision of the Circuit Court."

This quotation is taken from the body of the opinion and will be found on page 383 of Vol. 69 of the C. C. A. Reporter. It conclusively demonstrates that the Circuit Court of Appeals did take notice of the fact that the opinion of the Circuit Court was rendered after the franchise had terminated. By reference to the decision in the Circuit Court it will be found that the case was decided July 11, 1904, following the expiration of the franchise in April preceding. Of course, it was right and proper that the injunction should be dissolved, as the franchise upon which it was granted had in the meantime expired. For this reason the case is not in point and has no bearing.

Reference by counsel to the case of *Denver vs. Denver Waterworks Company*, recently decided by this Court, seems to us to have no application whatever. The Court there held that the language employed did nothing more than give the city an option to buy the works without an obligation to do so. We have never argued that any greater effect ought to be given to that provision in the Bullock franchise; and, since we contend for nothing more, it can have no bearing on the case. The rights and obligations we claim to arise under the franchise in favor of the water company and against the city are predicated on the exclusive right "to erect" waterworks, and the only bearing of the option is to show that the city reserved the right to buy in the eminently fair manner agreed on as consideration for its surrender of the right to erect.

Possibly it is because of the immateriality, or relative immateriality, of the construction of the clauses in question to the determination of the main issues in the *El Paso* and *Sionx Falls* cases (above) that the opinions fail to point out definitely whether consideration of the undisclosed matter

in these contracts outside of the clauses construed was ignored in arriving at the conclusions expressed. We insist that there is warrant for the inference that the ground of the construction must have rested upon a broader basis than what is disclosed in the opinions. For we submit that a *literal and grammatical interpretation* of the language of the clause in the present contract, considered in and by itself, would seem to afford no reason for assigning to the group of exclusive rights granted in the clause a bifurcation such as the city claims, and, indeed, no reason exists for doubting what was the precise meaning intended by the parties in using the phraseology adopted in the clause. The claim of construction made by the city in its pleadings in the case, the judgment in which is a bar to this case No. 41 (culminating in 202 U. S.), was that the waterworks company had no exclusive right to erect, although it was admitted that, if there was any liability at all under the contract, there was an exclusive right to maintain.

Rec., p. 29, third line from top, in conjunction with the last paragraph of p. 44, and the last eight lines on p. 38, and first seven lines from top of p. 39.

To justify denying the exclusiveness of the right to erect that in the same clause in plain terms extends also to the right to operate, counsel for the city suggests that the parties attached no importance to the exclusiveness of the right to erect; that it was slipped into the clause undesignedly through the negligence of counsel who drew the contract.

The language of the grant by appellant to Bullock & Company is the "exclusive right" for the "period of thirty years" to "erect," "maintain" and "operate" a system of

waterworks. Counsel for appellant contend that these words, taken together, are,

"in effect, a grant of the right to supply water, and the phrase, 'erect, maintain and operate,' was merely adopted as a means of expressing the intention of the parties with the usual legal tautology and in the customary legal cant."

We take it that counsel intend to assert that the words erect," "maintain" and "operate," as used in the franchise, are equivalents or appositives, as if written "erect," "maintain" or "operate." But the language will not bear this construction. These words, being connected by the conjunction "and," are necessarily co-ordinate, distributive and additive. Of course, there was but one grant, and it was single and indivisible. That has never been disputed. The point at issue is as to what was included in that grant. Appellant contends that nothing more than the "right to supply water," and appellee contends that the right to supply water was merely the inducement for the grant, but not the thing granted; that the thing actually granted was the exclusive use for thirty years of the streets, alleys and other public places to "erect," "maintain" and "operate" water works. The three words do not designate three separate grants; they simply mark the extent of the one grant. Erecting a waterworks is altogether different from maintaining, and operating is likewise different from erecting or maintaining. By the term "erecting" is meant the actual building of the works; "maintaining" designates the keeping up or repairing of the works after having been built; and "operating" is the furnishing of water through the works after the same have been built, and while being maintained. The three are required to designate the whole use of the

streets given to Bullock & Company by the franchise. We submit that there is neither "tautology" nor "customary legal cant" in the wording of the franchise, but that, on the contrary, the language used is peculiarly apt and appropriate. It cannot be that the appellant intended to grant merely the right to "supply water," as contended by appellant, because Bullock & Company, as all other persons, possessed that right independent of a public franchise. The appellant had no right to say to Bullock & Company, or any one of these: You shall not engage in the public water-supply business; but it did have the right to say: You shall not use the public streets for that purpose, because, under its charter, it was vested with the control of the streets and the uses to which they might be put. If Bullock & Company could have carried on the business without using the streets, the grant would have been unnecessary. It was in view of this fact that the franchise was made to provide that Bullock & Company shall have, not the exclusive right to supply water, but the exclusive use of the public streets, alleys, etc., "for the purpose of laying pipes, mains and other conduits, and erecting hydrants and other apparatus for conducting and furnishing an adequate supply of good, wholesome water" to appellant and its inhabitants.

Analyzing the language of the grant further, we observe that "right and privilege" are modified by the word "exclusive," thus giving to Bullock & Company the sole or undivided right to use the streets for the purposes named. We also observe that "right and privilege" are further modified by the phrase "for the period of thirty years," thus making the entire or unit grant continuous for that period. The terms employed, therefore, vested in Bullock & Company the exclusive use of the streets for thirty years to erect, maintain and operate waterworks.

Appellant admits that the right to "maintain" and "operate" is exclusive throughout the full period of thirty years, but argues that the right to "erect" is not exclusive throughout the entire thirty-year period; but that the appellant may enter the streets at any time to erect works of its own, provided it does not propose to operate such works until after the end of the thirty years. Certainly, the ordinary meaning of the words used and the ordinary grammatical construction do not warrant such conclusion. The grant may be likened to a tripod, having for its feet "the right to erect," "the right to maintain" and "the right to operate." The construction contended for by appellant would cut short one of the legs of the tripod by permitting appellant to construct a waterworks within the thirty-year period. This is against the plain letter of the franchise, and, as we see it, is not warranted by any canon of construction. Counsel for appellant support their argument for amputating one leg of the tripod on the ground that otherwise the appellant would at the end of the franchise be unable to provide a continuous supply of water unless it should purchase appellee's plant, and in this way a mere option to purchase would be equivalent to an obligation to do so. If the conclusion were correct, which it is not, it would not make the argument conclusive.

Considering the language of the franchise literally, the utmost effect against appellant is to deprive it of the right to construct new waterworks prior to the termination of the franchise. It would still have the right to enter into a contract with appellee or his successors. It would also have the right to regulate the rates so as to require the water to be furnished at reasonable rates. It would still have the right to build new waterworks after the termination of the franchise. The only possible contingency averse to

appellant would be for appellee to refuse to furnish water at all, and this contingency is covered by a further provision in the franchise, paragraph 9, which provides as follows:

"SEC. 9. At the expiration of each period of ten years after this ordinance takes effect the Mayor and Aldermen of the City of Vicksburg shall have the right and privilege to purchase the said waterworks. * * *

"The value of said system shall be ascertained as follows: The said Samuel R. Bullock & Company, their associates, successors or assigns, and the said Board of Mayor and Aldermen of the City of Vicksburg shall severally appoint one person, the two appointed shall choose a third, and the three persons thus chosen, who shall be hydraulic engineers, shall constitute a board to determine the values of said system of waterworks. None of the board shall be residents of the said Warren County."

As we have said (above) in discussing this same right, it gives to the city something of value that it would not possess except for the contract.

Suppose the franchise had been *exclusive* to "operate and maintain" a waterworks for thirty years. Could not the city then legally set up the claim that the water company did *not* have the exclusive right to "erect" a waterworks, and that it could "erect" one, provided it did not operate it during the life of the franchise? This proposition cannot be disputed. Thus, it necessarily follows that the word "erect" means something more than the right to "operate and maintain." This, we think, *demonstrates* that our contention that the word "erect" means something more than to "operate and maintain." If it does mean *more*, then it should be enforced to the *letter*, because that is the

letter of the contract; and this Court has held that the contract is exclusive as against the city; that the city had the power to make the contract *exclusive* against itself.

III.

AS TO ESTOPPEL.

It is not pretended that appellee did any positive act upon which the supposed estoppel is predicated. All that is claimed is that the water company and its receiver sat by in silence while the city laid the mains in question. The city was enjoined from erecting waterworks prior to November 18, 1916, under the decree in Suit 41, and was thereby perpetually estopped from setting up such right. Nevertheless, it now seeks to avoid its own estoppel by pleading a counter estoppel against appellee, which, we submit, cannot be done.

The judgment, decree and mandate in No. 41 was of record. Whatever appellant did by way of laying water mains, it did with actual knowledge and at its peril, as it was a party to said suit.

The Supreme Court of the United States, in *Sturm vs. Boker*, 150 U. S. 112, clearly presented the law relating to the subject-matter of estoppel:

"Both the defendants and the insurance companies had the written contracts before them, and were presumed, as a matter of law, to know their legal effect and operation. What the complainant said in his testimony was a statement of opinion upon a question of law, where the facts were equally well known to both parties. Such statements of opinion do not operate as an estoppel. If he had said, in express terms, that by that contract he was responsible

for the loss it would have been, under the circumstances, only the expression of an opinion as to the law of the contract, and not a declaration or admission of a fact, such as would estop him from subsequently taking a different position as to the true interpretation of the written instrument."

In *Bloomfield vs. Charter Oak National Bank*, 121 U. S. 121; 30 L. Ed. 923, this Court said:

"Upon the whole case there was no proof * * * of estoppel to bind the defendant town; * * * because there was no evidence of any acts of the town, which the plaintiff had a legal right to rely upon, or did, in fact, rely upon."

Even so, in the case at bar there is no act of the defendant pleaded or argued which could in contemplation of law give the city a legal right to believe the appellee had waived the injunction decreed in his favor in Suit 41, nor is it even pretended that the city did, as a matter of fact, rely on any such waiver when it laid the water mains and incurred the expense in question.

In *Brant vs. Virginia Coal and Iron Company*, 3 Otto 326; 23 L. Ed. 927, in discussing the doctrine of estoppel, the Court said:

"It is difficult to see where the doctrine of estoppel comes in here. For the application of that doctrine there must generally be some intended deception in the conduct or declaration of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud, by which another has been misled to his injury. 'In all this class of cases,' says Story, 'the doctrine proceeds upon the ground of constructive fraud or of gross negligence, which, in effect, implies fraud.' And, therefore, when

the circumstances of the case repel any such interference, although there may be some degree of negligence, yet Courts of equity will not grant relief."

* * *

"Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel."

In *Meridian Waterworks vs. Meridian*, 85 Miss. 515, the Supreme Court of Mississippi, in considering the question of estoppel in a case quite similar to the case at bar, said:

"We find nothing in the contention that a waiver amounting to an estoppel grows out of the city authorities allowing, or even ordering additions and improvements to be made after suit was brought. If there had been no agreement concerning this matter, appellant had full notice of the pendency of the proceedings to cancel the contract, and any improvement made thereafter could not be pleaded or taken advantage of to defeat an accrued right, or as an atonement for wrongs committed prior to the institution of the suit then pending. As to the extensions and improvements made after the suit was brought, appellant was a volunteer."

Under the authorities quoted above, the case at bar falls short of many of the essential elements of estoppel.

Nothing was done by complainant to deceive the defendant as to any legal right or to lead it to believe that he did not rely on the injunction in Suit 41 against the city's erecting a waterworks. The city does not claim that it was induced to lay the mains in question by reason of anything done by defendant, or even by defendant's silence. Its only contention is that the defendant having observed that it

was laying mains, failed to notify it that he objected, and would before the completion of the works take action to stop it. If all this were true, which it is not, it would fall far short of working an estoppel against appellee.

Again, it is not pretended that the city did not have the same knowledge of the decree in Suit 41 as the appellee. If it did, there can be no estoppel. Equal knowledge precludes an estoppel.

The fact that, after the filing of the original bill in this cause and almost immediately preceding the final hearing of the cause, the city was again advertising for bids to lay mains, and had to be enjoined from letting contracts therefor, conclusively shows that the moving cause was not the silence of the appellee. The city was now fully advised of the opposition of appellee by the contents of his bills of complaint, yet it endeavored as before to lay additional mains.

There is no element of injury to the city, which is essentially the basis of every effectual estoppel. Should the city build its own works, even after the franchise is at an end, it can use the mains already laid. It does not now propose to use them earlier than that time; hence, whether it be given the right to build now, as it contends for, or be required to wait until that time, can make no difference to the city.

In *Missouri vs. Illinois, etc., Disc't.*, 180 U. S. 208, the Court said:

"The State of Missouri, by acquiescing in the proceedings of the sanitary district of Chicago in devising and carrying out its sewerage system, is not estopped from seeking relief against the pouring of sewerage and filth through a drainage channel into the Mississippi River, to the detriment of the State of Missouri and her inhabitants. The State of Mis-

souri did not in any way encourage the adoption of that system, or by any act or word induce the city authorities to so direct the sewers that the flow from them should reach that State."

The appellant in the 7th assignment of error assigns that

"said Circuit Court of Appeals erred in not holding that appellee was estopped to assert that appellant has not the right to build a waterworks system of its own before the expiration of said franchise."

The appellant argues the question of estoppel in its brief on the merits, pages 66 to 69.

We respectfully submit that the appellant *did not* assign the ground for estoppel to the Circuit Court of Appeals. (See Rec., p. 240.)

Therefore, the Circuit Court of Appeals could not consider it under its rules (except the Court may consider a plain error not assigned), *but it did not do so*; and, therefore, it is **not a proper assignment of error** to this Court.

It cannot be assigned as error from that Court when it *was not* before the Court.

The appellant in its statement of fact, on pages 4 and 5, says:

"The city on the *first day of January, 1912*, declared its purpose and intention to construct a system of waterworks of its own, to be operated only after the expiration of said franchise, and to that end it called an election," etc.

The election was held on February 14, 1912, and on March 2, 1912, the receiver commenced the present suit. It

will thus be seen there was no time lost after the city had "*declared its purpose and intention*" to build, etc.

IV.

The legality of the bond issue is not before the Court in this appeal, and hence not argued.

We shall not argue the question of the legality of the bond issue because we do not conceive that question to be before the Court for adjudication. It was not decided by the District Court because he did not consider it necessary to be decided, but counsel for appellant, on page 91 of their brief, say: "but it (the decree) specifically enjoins it (appellant) from issuing the bonds which were authorized at the election held shortly before the bill was filed." This is an erroneous statement of fact, which we challenge on account of its bearing on the finality of the decree of the District Court. The words of the decree are (Rec. 205): "It is further ordered and decreed that the defendant (appellant here) * * * be and is hereby enjoined from disposing of the issue of four hundred thousand dollars of bonds with a view of constructing a water works system, or any part thereof, in said city during the life of said franchise, that is, between now and the 18th day of January, 1916." This relief is necessarily predicated on appellee's rights under the Bullock franchise. He was entitled to it whether the bond election was valid or not. It is to be further noted that the words of the decree do not injure the sale of the bonds except conditionally—*i. e.*, with a view of constructing waterworks prior to the termination of the franchise. It gives him no relief as a taxpayer because it does not declare the election void, nor does it decide anything against him as a taxpayer, because it does not

declare the election valid. If the decree itself be open to doubt as to whether any relief was given appellee as a taxpayer, the opinion of the District Judge may be looked to, because he expressly says that he considered no question but *res adjudicata* (Rec. 210, paragraph next last). The bond election could not affect what was decided in Suit 41, except it transgress the prohibition against building waterworks. This it did, and to that extent action under it was enjoined. This, however was entirely apart from the question of its validity of the election, and to any right he may have possessed as a taxpayer.

V.

The judgment below in favor of the appellees should be affirmed in all respects, with costs in all the courts.

Respectfully submitted,

EDGAR H. FARRAR,

J. C. BRYSON,

JOSEPH HIRSH,

RICHARD F. GOLDSBOROUGH,

Solicitors and Counsel for Appellees. S

MAYOR AND ALDERMEN OF THE CITY OF
VICKSBURG *v.* HENSON, RECEIVER OF THE
VICKSBURG WATER WORKS COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE
FIFTH CIRCUIT.

No. 546. Argued October 28, 1913.—Decided December 1, 1913.

A decree of the District Court to the effect that a contemplated issue of bonds, the issuance of which the bill sought to enjoin as wholly illegal, was illegal at that time, leaving open the question of whether it might be legal at a subsequent time, *held*, under the circumstances of this case, to be a final decree from which an appeal could be taken to the Circuit Court of Appeals.

Although the original bill depended solely upon diverse citizenship, independent grounds of deprivation of Federal rights which existed prior to the filing of the bill may be brought into the case by amended bill, and if so, the jurisdiction of the District Court does not rest solely on diverse citizenship and the judgment of the Circuit Court of Appeals is not final but an appeal may be taken to this court. *Macfadden v. United States*, 213 U. S. 288.

While the enforcement of the rule of *res judicata* is essential to secure the peace and repose of society, it is equally true that to enforce the rule upon unsubstantial grounds would work injustice.

A decree is to be construed with reference to the issues it was meant to decide; its nature and extent is not to be determined by isolated portions thereof, but upon the issue made and what it was intended to accomplish.

A decree in a former action between a municipal water company and the municipality that the former had an exclusive contract for a specified period and that the latter could not issue bonds for the purpose of establishing a municipal water supply to be forthwith put into operation, rendered while the franchise had a long period to run, *held* in this case not to be *res judicata* as to the right of the municipality to issue bonds within a short time prior to the expiration of the franchise for the purpose of erecting water works which were not to be put into operation until after the expiration of the existing franchise.

203 Fed. Rep. 1023, reversed.

THE facts, which involve the jurisdiction of this court of appeals from judgments of the Circuit Court of Appeals and the extent to which a former judgment is *res judicata* of the right of a municipality to issue bonds for establishing a water supply in view of existing contracts with a water works company, are stated in the opinion.

Mr. T. C. Catchings, Mr. O. W. Catchings, Mr. George Anderson and Mr. John Brunini for appellants, submitted.

Mr. Edgar H. Farrar, with whom *Mr. J. C. Bryson, Mr. Joseph Hirsh and Mr. Richard F. Goldsborough* were on the brief, for appellees.

MR. JUSTICE DAY delivered the opinion of the court.

This suit originated in the District Court of the United States for the Southern District of Mississippi, where an injunction restraining the appellants from constructing a water works system during the term of a certain franchise previously granted by the city of Vicksburg was allowed upon the complaint of W. A. Henson, Receiver of the

231 U. S.

Opinion of the Court.

Vicksburg Water Works Company, one of the appellees herein (whom we will hereafter call "the receiver"), and the decree upon appeal was affirmed by the Circuit Court of Appeals for the Fifth Circuit (203 Fed. Rep. 1023), from which affirmance this appeal is taken.

The case, as made out in the District Court and shown by the record, appears to be:

The receiver alleged that in 1886 the city, under authority of an act of the legislature, by ordinance granted to Samuel R. Bullock & Company a franchise to furnish the city with water for a term of thirty years; that he had succeeded to the rights and interests of Bullock & Company; that he was paying taxes upon the property of the Vicksburg Water Works Company and was entitled to the rights and privileges of a taxpayer; that in 1900 the city of Vicksburg attempted to abandon the contract and to build and operate a water works system of its own, and that in a suit instituted in the Circuit Court of the United States for the Southern District of Mississippi, such action had been enjoined; that by the final decree therein it was, among other things, ordered "that the defendant refrain from constructing water works of its own until the expiration" of the franchise, and that, upon appeal to this court, such decree was affirmed. The pleadings, final decree and opinion of this court in the former case and the franchise of 1886, were introduced into the record in this case as exhibits, and, to save repetition, reference is made to the franchise as quoted in 185 U. S. 65, to the opinion in 202 U. S. 453, and to the outline of the pleadings in that case as set forth in those reports.

The receiver alleged further that the city had since made efforts to free itself from the franchise, and specified various suits and negotiations to that end; that early in 1912 the appellants by resolution and election undertook to authorize the sale of bonds for the construction of a water works plant, which was not to be operated until

after the expiration of the franchise; that he would be compelled to pay taxes upon such bonds and that the issuance and sale of the bonds and the construction of the plant would depreciate the value of the Water Works Company's property; that the city was commencing the construction of a plant too long before the expiration of the franchise; that the purpose of the city was really to depreciate the value of the Water Works Company's plant so that the city might buy it at a price materially less than its actual value; and that the bond election, for several reasons, which the receiver stated, under the statutes and constitution of Mississippi and because of fraud was of no effect, and the receiver offered to sell the plant at any time upon appraisement. The receiver prayed that the appellants be enjoined from issuing bonds for the construction of a water works system and from taking any further steps toward the building of such plant during the term of the franchise, for the reason that the matter of construction of the plant during such time was *res judicata* and that such construction would violate the franchise, and further that the bond election was void. The receiver also prayed for an injunction restraining the appellants from letting contracts for the laying of certain water mains, in violation of the franchise and of the decree in the former suit.

The appellants denied that the decree in the former case precluded the question raised here, and that the construction by the city of its own water works system would violate the terms of the franchise; that the receiver was, or was entitled to the rights and privileges of, a taxpayer, and alleged that the statement by the receiver of the dealings and negotiations between the city and the Water Works Company was irrelevant and false. They also denied that the receiver or the Water Works Company, as a taxpayer, would be affected by the bond issue; and alleged that, if the issuance of the bonds and construc-

231 U. S.

Opinion of the Court.

tion of the plant should depreciate the property of the Water Works Company, it would be something for which it would not be responsible. They further denied that the steps taken by the city were premature, in view of the long time that must elapse before the expiration of the franchise, and that the city did not intend to build a plant; and alleged that the purpose of the Water Works Company was to compel the city to buy its plant at an exorbitant price; and they denied that the bond election was void. The appellants further alleged that if the decree should be construed as contended for by the receiver, the court below, as a court of equity, would not at that time give the decree that effect, for the reason that the situation of the parties was so changed as to make it inequitable to prohibit the appellants from taking the action sought to be enjoined; that the receiver by permitting the city to lay certain mains had conceded the appellants' right to construct a water works plant and was estopped from contesting such right; that the receiver and the Water Works Company actively participated in the election, conceding appellants' right to build its own water works system, and therefore were estopped from asserting the contrary; that the receiver, by conceding appellants' right to construct its plant, itself construed the decree as only enjoining competition and that the court should give effect to the decree as construed by the parties, and that the decree did not attempt to enjoin the sale of bonds and that that is all that is sought to be restrained by this suit. The appellants also denied that the letting of contracts for laying mains would violate either the decree or the franchise.

Upon petition, Lelia Boykin, a taxpayer of the city of Vicksburg, the other appellee herein, was, upon order, admitted as a party to the suit, and by proper pleadings issues were made with reference to her as such taxpayer.

Upon final decree the court held that the receiver was

entitled to the relief prayed for and ordered that the appellants be enjoined from constructing a system of water works and from disposing of the bonds covered by the suit during the term of the franchise, and in its opinion the court based its decision upon the decree made by it and its affirmance in 202 U. S. and decided that the matter was *res judicata*. Upon appeal to the Circuit Court of Appeals the decree of the District Court was affirmed upon the ground that the decree and affirmance in the case in 202 U. S. constituted an estoppel. The case was thereupon brought here upon appeal, the assignments of error asserting that the Circuit Court of Appeals erred in affirming the decree of the District Court, in holding that the decree affirmed in 202 U. S. was an estoppel and that the appellants had no right to build a water works system before the expiration of the franchise and in not deciding that the receiver was estopped to assert that appellants did not have such right.

A motion was made to dismiss the appeal, first, upon the ground that the decree was not final in the District Court, and hence was not appealable to the Circuit Court of Appeals, because it left undisposed of one of the substantial issues in the case. That contention arises from this alleged situation: The pleadings of the receiver, as well as the petition filed by the intervenor, Lelia Boykin, attacked the right to issue the bonds in question upon a ground independent of the former adjudication, namely, because the election at which the bonds were authorized to be issued was illegal for the reason that the city failed to make the statutory publication of the election and that the curative act was unconstitutional, for the reason that the city had exceeded the limit of indebtedness allowed under chapter 142 of the laws of Mississippi for 1910, the exception in such act being unconstitutional, and for the reason that the bond election was held under an ordinance purporting to amend the charter of the city which ordi-

231 U. S.

Opinion of the Court.

nance was itself void, and for fraudulent and corrupt practices and for unlawful registration. This ground of attack, the appellees say, went to the right to issue the bonds to build a water works system at any time and rendered them invalid whether undertaken to be issued before or after the expiration of the Bullock franchise, and that such is the case is said to appear from reference to the final decree which was entered in the suit. The decree enjoined the appellants from building or constructing a system of water works or any part thereof within the city until after the eighteenth day of November, 1916, the date of the termination of the Bullock franchise, and it further provided:

"It is further ordered and decreed that the defendant, the Mayor and Aldermen of the City of Vicksburg, be and is hereby enjoined from disposing of the issue of four hundred thousand dollars (\$400,000.00) of bonds mentioned and described in the pleadings with a view of constructing a water works system, or any part thereof, in said city during the life of the said franchise, that is, between now and the 18th day of November, 1916."

So much of the decree as relates to the bonds, it is contended, leaves open the right of the city to issue them after the expiration of the Bullock franchise, although they were attacked as being wholly illegal and the city wanting authority to issue them at any time.

It is true that the original bill contained allegations which went to the validity of the issue of bonds, if the same were proposed to be issued after the expiration of the Bullock franchise, as well as before the expiration of that time, and the prayer of the original bill among other things asked for an injunction restraining the defendant city from issuing the bonds or taking any action to that end by virtue of the election. In the amended and supplemental bill filed in the case, however, not only allegations by way of amendment were made, but the case was restated at great length and the prayer of the bill asked upon

final hearing for "a decree against the said defendant holding the said bond election void and without effect, and the said defendant without power to issue and float said bonds for the purpose of building a water works plant during the life of the Bullock franchise, and for an injunction against the said defendant restraining it from issuing bonds under the said election and from taking any further steps looking to the building of a water works plant during the life of the said Bullock franchise," and for general relief. When Lelia Boykin intervened, she filed a petition averring that she was the owner of real estate in and a taxpayer of the city of Vicksburg, and a citizen and resident of Georgia, adopting the allegations of the original bill and amended and supplemental bill, except so much thereof as set up the former adjudication in favor of the Water Works Company, and joining in the original complainant's prayer for relief and also asking for general relief.

It may be true that there were allegations in the pleadings which permitted or required a consideration of the law under which the bonds were to be issued for the purpose of erecting a water works system and which were independent of the alleged claim of *res judicata*, but the record and proceedings make it evident that the court and the parties concerned treated the bill as an attack upon the right of the city to proceed to build a water works system before the expiration of the Bullock franchise, although to be operated thereafter. The opinion of the court and the decree shows that the court so regarded it, and no objection to this disposition of the case was made by any of the parties, and when the case reached the Circuit Court of Appeals a motion was made to dismiss upon the ground that the proceeding was merely ancillary to the decree of the court, affirmed in this court (202 U. S. 453), enjoining the city from constructing and operating a plant of its own during the term of the fran-

231 U. S.

Opinion of the Court.

chise. The decree was final as to the city's right to do what it was then proposing to do, to issue bonds and erect a system of water works to be used after the expiration of the Bullock franchise. The decree as rendered prevented the city from doing this. There was no reservation of the right to a further decree as to the legality of the bonds, and no retention of jurisdiction after the decree for any purpose. Neither in the Circuit Court of Appeals nor in the District Court was there any attempt to require the court to consider the case in its further aspect, but as we have said both courts and all parties treated the case as presenting a controversy concerning the right of the city to proceed, as it was about to do, to sell the bonds and build a plant before the expiration of the franchise in question. The record thus considered, we think there was a final decree in the District Court from which an appeal could be taken to the Circuit Court of Appeals.

The further contention is made that the jurisdiction of the Circuit Court of Appeals was final because the jurisdiction of the District Court as originally invoked depended solely upon diverse citizenship. But it appears that when the amended and supplemental bill was filed there were added to the ground of original jurisdiction allegations concerning the proper construction of the contract rights of the receiver, which attacked the proposed action of the city on the ground that it would be destructive of constitutional rights. We think those allegations brought into the case a ground of jurisdiction independent of diversity of citizenship. They were grounds which existed before the suit was begun, which might have been averred in the original bill and which were brought into the case by the amendment. We think therefore that the jurisdiction of the District Court did not rest solely upon diversity of citizenship, but upon the additional ground of deprivation of Federal right. In this view the decision of the Circuit Court of Appeals is not final, and an appeal may

be taken to this court. *Macfadden v. United States*, 213 U. S. 288.

Coming to the question whether the former decree disposed of the rights of the parties, as was held in the court below, which judgment was affirmed by the Circuit Court of Appeals, it is undoubtedly true that a right, question or fact put in issue and decided by a court of competent jurisdiction must be taken as settling the rights of the parties in respect to such controversy and while it remains undisturbed is conclusive between them. The enforcement of this rule has been repeatedly said to be essential to secure the peace and repose of society and in order that an end may be made of controversies between parties who have once invoked and have had the determination by a competent judicial tribunal of the matters in dispute between them. It is no less true that to hold upon any unsubstantial ground that a controversy has been thus concluded is to do an injustice to litigants. We must therefore be careful to see, when the contention of former adjudication is made, that the matter was actually presented and decided and the rights of the contending parties thereby concluded. We think that an examination of the record in the former case, put in evidence in this case, does not support the contention that the matter here in issue was then adjudicated and determined. It is true there is some broad language in the decree. It provided:

"Fourth. That the said defendant refrain from in any manner accepting the benefits of or proceeding under the act of the Legislature of the State of Mississippi, approved March 9th, 1900, and from issuing bonds under and by virtue of said act or any other act, or ordinance for the purpose of erecting water works of its own during the period prescribed in said ordinance contract and franchise.

"Fifth. That the said defendant refrain from constructing water works of its own until the expiration of the

231 U. S.

Opinion of the Court.

period prescribed in the said ordinance contract and franchise dated 18th day of November, 1886."

The fifth paragraph read alone without regard to the pleadings in the case would broadly enjoin the city from constructing a water works system of its own until the expiration of the period named in the franchise held by the complainant. The fourth paragraph used language in enjoining the issuance of bonds which concluded with an injunction "from issuing bonds under and by virtue of said act or any other act, or ordinance for the purpose of erecting water works of its own during the period prescribed in said ordinance contract and franchise." It is also true that the court in concluding its opinion in 202 U. S. said that it found "no error in the decree of the Circuit Court enforcing the contract rights of the complainant and enjoining the city from erecting its own works during the term of the contract."

It is well settled, however, that a decree is to be construed with reference to the issues it was meant to decide. *Graham v. Railroad Company*, 3 Wall. 704, 710; *Reynolds v. Stockton*, 140 U. S. 254; *Vicksburg v. Vicksburg Water Works Co.*, 206 U. S. 496, 507; *Haskell v. Kansas Natural Gas Co.*, 224 U. S. 217, 223. In *Barnes v. Chicago, M. & St. P. Ry. Co.*, 122 U. S. 1, this court, speaking by Mr. Chief Justice Waite, said (p. 14):

"Every decree in a suit in equity must be considered in connection with the pleadings, and, if its language is broader than is required, it will be limited by construction so that its effect shall be such, and such only, as is needed for the purposes of the case that has been made and the issues that have been decided. *Graham v. Railroad Company*, 3 Wall. 704. Here the suit was by and for creditors to set aside the mortgage to Barnes and the foreclosure thereunder, because made and had to hinder and delay them in the collection of their debts. The decree, therefore, although broader in its terms, must be held to mean

no more than that the foreclosure was void as to these creditors, whose claims were inferior in right to that of the mortgage, and that the Minnesota Company was restrained and enjoined from asserting title as against them."

What was the situation which confronted the parties at the time of the institution of the original suit, and what rights were the Water Works Company striving to protect? The Company contended that it had a franchise good for thirty years and that this franchise was exclusive, at least in so far as it would prevent the city from building a water works system of its own and operating it in competition with the plaintiff company and in destruction of its rights yet to be enjoyed under its unexpired franchise. At that time the franchise had over half its term yet to run. There was no indication on the part of the city that it intended to build a water works system of its own and then await the expiration of the franchise before it operated such system. The city contended for and maintained the right to erect its own system and operate it at that time and in competition with the Water Works Company. This competition it was contended would be destructive of the rights and property of the complainant and virtually destroy the exclusive privilege which the city had granted to it for the period of thirty years. It was only after the conclusion of the litigation that the city undertook to construct a water works system, withholding operation thereof until the expiration of the franchise belonging to the Water Works Company. It was driven to that position by the decree against it in the former case. The building of such water works system, and not the one that it originally intended, was only proposed by the city after it had lost the original controversy, in which it contended for the right to erect a competing plant to be operated during the term of the franchise. Reference to the original bill filed in the former case confirms this view, where the following appears:

231 U. S.

Opinion of the Court.

"By reason of said ordinance and contract [the franchise] said city has no right within the period of thirty years to engage in the business of supplying water to the inhabitants of said city in competition with said Bullock & Company, or their assigns, notwithstanding which, said act [under which the city was then proceeding to erect a plant] authorizes and permits said city to construct and maintain water works for said purpose;" and the prayer, in part, asked that the defendant might be "decreed from constructing or acquiring and operating a system of water works in competition with your orator's water works." The amended and supplemental bill read, in part, as follows:

"Therefore said city by its contract and ordinance with S. R. Bullock & Company and assigns are precluded from issuing and selling bonds to build, construct, maintain and operate a water works of its own, as provided by said legislative act and said resolution and said election of 1900, in competition with your orator against its own contract.

"The premises considered, your orator prays that this Honorable Court will enjoin the defendant from issuing and selling said bonds for the purpose of building and constructing water works of its own in competition with your orator."

In considering the rights of the parties and the position taken by them, this court in 202 U. S. 453 *et seq.* said (p. 458):

The rights of the Water Works Company under its exclusive contract, it alleged, "would be practically destroyed if subjected to the competition of a system of water works to be erected by the city itself." "We think it would be a palpable injustice to the stockholders to permit the competition of the city by new works of its own; which, whether operated profitably for the municipality or not, might be destructive of all successful opera-

tion in furnishing water to consumers by the private company." Stating the question of the power of the city to grant an exclusive contract: "Whether it can, in exercising this legislative power, exclude itself from constructing and operating water works for the period of years covered by the contract." (p. 469) "And unless the city has excluded itself in plain and explicit terms from competition with the Water Works Company during the period of this contract it cannot be held to have done so by mere implication." (p. 470) "These are the words of the contract and the question upon this branch of the case is, conceding the power of the city to exclude itself from competition with the grantee of these privileges during the period named, has it done so by the express terms used? It has contracted with the company in language which is unmistakable, that the rights and privileges named and granted shall be *exclusive*. Consistently with this grant, can the city submit the grantee to what may be the ruinous competition of a system of water works to be owned and managed by the city, to supply the needs, public and private, covered in the grant of privileges to the grantee? It needs no argument to demonstrate, as was pointed out in the *Walla Walla Case*, that the competition of the city may be far more destructive than that of a private company. The city may conduct the business without regard to the profit to be gained, as it may resort to public taxation to make up for losses. A private company would be compelled to meet the grantee upon different terms and would not likely conduct the business unless it could be made profitable. We cannot conceive how the right can be exclusive, and the city have the right at the same time to erect and maintain a system of water works, which may and probably would practically destroy the value of rights and privileges conferred in its grant." (p. 471) "We think it was distinctly agreed that for the term named the right of furnishing water to

231 U. S.

Opinion of the Court.

the inhabitants of Vicksburg under the terms of the ordinance was vested solely in the grantee, so far at least as the city's right to compete is concerned."

And in 206 U. S. 496, where it was contended that the former adjudication was a bar to the rights contended for in regulating rates, this court in construing its former decision in 202 U. S. said (206 U. S. 506): that the former case "was regarded as settling the right of the Water Works Company under the contract, to carry on its business without the competition of works to be built by the city itself, as the city had lawfully excluded itself from the right of competition."

It is said that upon the argument in this court of the case in 202 U. S. the too broad character of the decree was brought to our attention. An examination of the briefs then filed shows that this objection rested upon the allegation that the decree would prevent the city from putting in hydrants and other facilities not covered by the contract. There was no suggestion that the city would be prevented from putting in its own water works for use after the expiration of the franchise.

The nature and extent of the former decree is not to be determined by seizing upon isolated parts of it or passages in the opinion considering the rights of the parties, but upon an examination of the issues made and intended to be submitted and what the decree was really designed to accomplish. We cannot agree with the court below or with the majority of the Circuit Court of Appeals that the effect of the former adjudication was to preclude the rights of the parties in the present controversy.

Upon the merits, irrespective of the effect of the former decree, we think the object and purpose of the franchise granted to Bullock & Company, and their successors, was to permit and protect the operation of a system of water works to the end of the franchise term. After that time the city was to be free to supply its inhabitants itself,

if it saw fit, or make other contracts with those who could supply the wants of the city in that respect. We see no reason why the city might not, if it so determined, make preparation for water supply to its own citizens which would be available upon the expiration of the contract, the contract accomplishing that purpose until by its terms it had expired. To appropriately accomplish this required time and we think the city was within its rights, not being obligated by any contract to purchase the works of the Water Works Company, the company having been content to accept the franchise without this requirement, and was free to make other adequate provision to meet this essential requirement of the inhabitants of the city.

The views we have expressed require a reversal of the judgment of the Circuit Court of Appeals, affirming the decree of the District Court. It is therefore ordered that the judgment be

Reversed and the case remanded to the District Court of the United States for the Southern District of Mississippi, for further proceedings not inconsistent with this opinion.